PP

v.

DATUK HJ SAHAR ARPAN

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CRIMINAL TRIALS NOS: 45-2-1997; 45-3-1997 & 45-4-1997]
20 APRIL 1999

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance 1970 - Section 2(1) - Corrupt Practice - Corrupt practice by member of the administration - Proof - Whether State Executive Councilor a member of the administration - Pecuniary advantage - Definition and ingredient*

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance 1970 - Section 2(1) - Corrupt practice - Corrupt practice by member of the administration - Proof - State Executive Councilor applying for government land and participated in deliberation thereof - Whether guilty of corrupt practice - Definition of 'corrupt practice'*

EVIDENCE: *Credibility - Impeachment - Procedure - Appropriate stage when court should decide whether a witness has been impeached - Appropriate time to rule on creditworthiness - Whether at the end of impeachment proceedings - Evidence Act 1950, s. 155*

EVIDENCE: *Privilege - Affairs of state - Whether papers pertaining to State EXCO meetings classified as official secrets - Whether privileged and protected - Tendering of EXCO papers as evidence by state official - Effect - Whether a waiver of privilege - Evidence Act 1950, ss. 162, 163 - Official Secrets Act 1972, ss. 2, 8*

EVIDENCE: *Documentary evidence - Computer printouts - Documents produced from microfilms and computers - Information and data undisturbed by human hands - Admissibility - Whether original documents - Whether primary evidence - Whether document properly tendered - Evidence Act 1950, s. 90A*

WORDS & PHRASES: *"member of the administration" - Emergency (Essential Powers) Ordinance 1970, s. 2(2)*

WORDS & PHRASES: *"corrupt practice" - Emergency (Essential Powers) Ordinance 1970, s. 2(1)*

Datuk Hj Sahar Arpan, formerly the State Assemblyman ('ADUN') for Durian Tunggal and a member of the Melaka State Executive Council ('EXCO'), faced three charges of having committed corrupt practice pursuant to s. 2(1) of the Emergency (Essential Powers) Ordinance 1970 ('the Ordinance'). Sometime in February 1994, the accused, already an ADUN and an EXCO member, bought a company called Ivory Heights Sdn Bhd ('Ivory Heights'). Ivory Heights had sought to carry out an aquaculture project in Melaka and for that had applied for two parcels of state lands in Bertam and Bachang respectively ('the said land'). On 7 September 1994 the EXCO deliberated on the application and approved the same. Thereafter, Ivory Height applied to change the lease of the said land from 60 years to 99 years, and the EXCO, having deliberated on the matter on 21 December 1994, accordingly extended the lease period of the said land. Ivory Heights then applied to expand the approved area of the land in Bertam from 3.3718 hectares to 3.6204 hectares and the land in Bachang from 6.8230 hectares to 7.2019 hectares. Again, the EXCO, following its meeting and deliberations on 23 August 1995, approved the said Ivory Heights' application. The facts showed however that the accused, in his capacity as an EXCO member, was present at all the three EXCO meetings aforesaid, and had never declared his interest in Ivory Heights nor left the meeting room at all the relevant times. It was also evident that, initially, Ivory Heights' application for the said land was opposed *inter alia* by the State Fisheries Department, but the latter subsequently changed its stand when the accused intervened and said that the applications were submitted by his "anak buah". The facts also evinced that Ivory Heights, or the said land, was subsequently disposed off by the accused, with the result that at least RM500,000 had passed hands and been paid to the accused. Before the learned judge, the accused raised a defence, *inter alia*, that the RM500,000 was payment for the sale of his lands at Macap ('lots 2253 and 2484 transaction'), supposedly bought by one Othman bin Kassim. In the circumstances, a question arose as to whether the accused, on the facts, had committed 'corrupt practice' within the meaning accorded to that term by s. 2(2) of the Ordinance.

Held:

[1] The phrase 'member of the administration' as defined in art. 160(2) of the Federal Constitution includes a member of the State Executive Council. In law, members of administration having an interest in the matter under discussion at an EXCO meeting must declare their said interest. Consequently, the member's silence at the meeting is insufficient.

[2] The term 'corrupt practice' as defined in s. 2(2) of the Ordinance, just like 'pecuniary advantage', must be given a liberal interpretation. The expression 'pecuniary' refers to the benefits obtained by a person which may be valued in monetary terms and it includes a financial debt or obligation which is released, reduced, evaded, deferred or redeemed partially or wholly, immediate receipt of benefits, credit or cash and/or benefit. Pecuniary advantage at the very least means a gain or benefit which may be valued in monetary terms, personally beneficial to the accused person even though someone else may derive direct benefit from it.

[3] On the facts, there was substantial evidence pointing to the accused's ownership of Ivory Heights. Considering the incredibly large number of times the accused got involved with Ivory Heights, right from the word go, the court cannot be expected to be naïve and believe that his contributions to the company were mere helping hands normally given by State Assemblymen or EXCO members to the people or to people in their constituents. The evidence also points to the fact that the accused was totally aware of the events that took place in and around Ivory Heights, and was always in command of the situation. The accused was indeed the alter ego of Ivory Heights.

[4] EXCO papers came within the definition of 'official secrets' in s. 2 of the Official Secrets Act 1972 and were accorded total protection unless waived. However, once the documents were produced and tendered as evidence, the full effect of the provisions of the Evidence Act 1950 must be complied with. Where the papers were tendered as evidence by the secretary of the State Executive Council, as happened here, it means that the state government had waived the privilege or protection.

[4a] It is clear, upon perusing the Exco papers, that the accused was present on all the dates and meetings in question. It was also clear that the accused, apart from not leaving the sessions, had also not declared his interest in the applications by Ivory Heights. And the facts further showed that, notwithstanding the objection of two major government departments to the applications, the applications by Ivory Heights were still successful. Clearly, the intimidating presence of the accused had a profound influence over those meetings. In the circumstances, his said presence could be construed as an abuse of his public position.

[5] Pursuant to s. 155(2) of the Evidence Act 1950, the credit of a witness may only be impeached by resorting to his previous statements and nothing more. Sub-provisions (a), (b) and (c) of s. 155 were mutually exclusive and therefore does not entertain the consideration of any other

evidence, or for that matter 'the rest of the evidence'. Also, an immediate finding may be made at the conclusion of the impeachment proceeding. In the circumstances of this case, it is appropriate to impeach the credit of PW15 and PW16 at the end of the impeachment proceedings, without waiting for the close of the prosecution's case.

[6] The chain of evidence systematically produced by the prosecution had successfully retraced the RM500,000 received by the accused, all the way back to the cheque of RM737,671.50 issued by Messrs. S.K. Khoo and of course connected to the Ivory Heights transactions. The accelerated payments received by the accused, later credited into those LUTH's accounts, were certainly a 'pecuniary advantage' as envisaged by the Ordinance, obtained by virtue of his position as a 'Member of the Administration'. The scope of the term "advantage" is certainly wide enough to include the benefits obtained by the accused.

[7] The lots 2253 and 2484 transaction was not a genuine transaction. If it were, then after the alleged deposit payment of RM67,000, Othman Kassim ought to still pay the accused the balance sum of RM607,500. But strangely, Othman Kassim was blatantly oblivious of his financial predicament and made no attempt whatsoever to seek financial assistance. The accused, conversely, behaved as if it were he who was in dire need of financial assistance. Clearly, the very conduct of these two personalities defied logic. Their conduct only fortified the finding that lots 2253 and 2482 transaction was but a concocted story, manufactured by Othman Kassim and the accused to enrich themselves. It was a story activated to camouflage the accused's corrupt practice, more so when lots 2253 and 2484 only had a collective value of RM74,000.

[8] Othman Kassim is a *participes crimines* in respect of the charges against the accused. That notwithstanding, an accomplice is a competent witness against an accused person and a conviction is not fatal merely because it proceeds upon the uncorroborated testimony of an accomplice pursuant to s. 133 of the Evidence Act 1950. An accomplice's evidence stands on the same footing as any other evidence and the court is competent to sieve such testimony and to receive only the relevant part, after sufficient scrutiny has taken place.

[9] The computer-printouts relating to the banking transactions had been properly tendered by the prosecution and were admissible in evidence. Over and above that of s. 90A of the Evidence Act which permits the introduction of computer documents, and strengthened by s. 90C which overrides the Banker's Books Act, the prequisites of ss. 3, 4 and 5 of

the Banker's Books (Evidence) Act 1949 had clearly been complied with, as Bank Negara had given its requisite consent. In the event, the copies of the original books of the banks and their entries could be receivable at the trial, as *prima facie* evidence of the entries of related matters, transactions and accounts stated therein.

[9a] The printout from the computer herein was not a copy or an extract from any document but an original document. This court therefore had no hesitation in admitting the relevant statements of accounts of the accused. Even though the same were many times removed from the first produce of the initial computer, the on-line system of the relevant institutions ensured the authenticity of the data as no information had been tampered. By the same token, the documents produced by the registrar of companies, tendered by the prosecution, were also primary evidence, and therefore admissible.

[10] The accused's testimony depended totally on mere postulations and unsupported assertions. None of the pertinent parts were however corroborated by documentary or oral evidence. On the contrary, the prosecution's witnesses have remained unimpeached, apart from Md Yusof and Jaini, thus leaving their evidence unaffected. The total effect of this finding is that the prosecution's case has remained unrebutted. With such proliferation of evidence, the court is left with no alternative but to declare that the prosecution has proven all the three charges against the accused beyond reasonable doubt.

[Accused convicted as charged; sentenced to two years' imprisonment and RM20,000 fine, in default six months' imprisonment, on each of the charges; sentences to run concurrently from date of sentence.]

Case(s) referred to:

A Ragunathan v. PP [1982] 1 CLJ 25 ***(refd)***
Air Canada v. Secretary of State For Trade (No 2) [1983] 2 AC 394 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(refd)***
Ameeroonissa Khatoon v. Abedoonissa Khatoon [1874-75] 2 IA 87 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Au King Chor & Ors v. PP [1985] 1 CLJ 122 ***(refd)***
Aw Kew Lim & Ors v. PP [1988] 1 CLJ 584 ***(refd)***
Barker v. Wilson [1980] 2 All ER 81 ***(refd)***
Chong Ah Chai & Ors v. PP [1979] 2 MLJ 262 ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***
Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 ***(refd)***

Davies v. Director of Public Prosecutions [1954] 1 All ER 507 ***(refd)***
Devi Prasad & Anor v. State AIR [1967] Allahabad 64 ***(refd)***
Foo Gee Yaw v. Low Koo Biow [1996] 5 MLJ 7 ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 ***(refd)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Hennessy v. Wright [1888] 21 QB 509 ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 230 ***(refd)***
Husdi v. PP [1980] 2 MLJ 80 ***(refd)***
Khoo Hi Chiang v. Public Prosecutor & Anor Appeal [1994] 2 CLJ 151 ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 ***(not foll)***
Lee Chee Meng v. PP [1992] 1 CLJ 345 ***(refd)***
Lee Kok Nam v. PP [1999] 5 CLJ 283 ***(refd)***
Makanjuola v. Commissioner of Police of the Metropolis [1992] 3 All ER 617 ***(refd)***
Mathew Lim v. Game Warden, Pahang [1960] 26 MLJ 89 ***(refd)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(refd)***
Nunis v. PP [1982] 2 MLJ 114 ***(refd)***
Ong Joo Chin v. Rex [1946] 12 MLJ SSR 1 ***(refd)***
Paramasivam v. PP [1970] 2 MLJ 106 ***(refd)***
Pavone v. PP [1986] 1 MLJ 72 ***(refd)***
Pavone v. PP (No 2) [1986] 1 MLJ 423 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133 ***(refd)***
PP v. Adnan Ishak [1992] 2 CLJ 1234 ***(refd)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180 ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Dato' Hj Mohamed Muslim Hj Othman [1983] 1 MLJ 245 ***(refd)***
PP v. Dato' Kee Yong Wee & Ors [1987] 2 CLJ 329 ***(refd)***
PP v. Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 ***(refd)***
PP v. Lo Ah Eng [1965] 1 MLJ 241 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Munusamy [1980] 2 MLJ 133 ***(refd)***
PP v. Mustaffa Ahmad [1986] 1 MLJ 302 ***(refd)***
PP v. Tan Gong Wai & Anor [1985] 1 MLJ 355 ***(refd)***
PP v. Tan Seow Chuan [1985] 1 MLJ 318 ***(refd)***
R v. Chief Constable of West Midlands, ex p Wiley [1994] 3 WLR 433 ***(refd)***
R v. Ewing [1983] 2 All ER 645 ***(refd)***
R v. Harper & R v. Minors [1989] Cr App R 102 ***(refd)***
Re Soo Leot [1956] 22 MLJ 54 ***(refd)***
Re Wee Swee Hoon; Lim Ah Moy & Anor v. Ong Eng Say [1953] 19 MLJ 123 ***(refd)***
Sia Soon Suan v. PP [1966] 1 MLJ 117 ***(refd)***
Standard Chartered Bank v. Mukah Singh [1996] 3 MLJ 240 ***(refd)***
Stanley William Wood [1983] 78 Cr App R 23 ***(refd)***
Sun Kam Heng v. PP [1993] 1 CLJ 109 ***(refd)***

Syed Abdul Aziz & Anor v. PP [1993] 3 SLR 534 ***(refd)***
Takong Tabari v. Government of Sarawak & Ors [1995] 1 CLJ 403 ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(refd)***
The Statute of Liberty [1968] 2 All ER 195 ***(refd)***
Tsia Development Enterprise Sdn Bhd v. Awang Dewa [1984] 1 MLJ 301 ***(refd)***
Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor [1985] 2 CLJ 126 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yusoff Sidin v. PP [1971] 1 MLJ 203 ***(refd)***

Legislation referred to:
Banker's Books (Evidence) Act 1949, ss. 3, 4, 5, 6, 9
Criminal Procedure Code, ss. 112, 376
Emergency (Essential Powers) Ordinance 1970, s. 2(1), (2)
Evidence Act 1950, ss. 2, 3, 61, 62, 63(b), (c), 64, 65, 74, 104, 114(e), 123, 133, 145, 153, 155(a), (b), (c), 162(2)
Evidence (Amendment) Act 1993, ss. 90A, 90C
Federal Constitution, arts. 43(3), 145(3), 160(2)
Official Secrets Act 1972, ss. 2, 8
State Constitution (Melaka), arts. 7(3), 43(3)

Criminal Evidence Act 1965 [UK], s. 1(1)
Crown Proceedings Act 1947 [UK], s. 28
Police and Criminal Evidence Act 1984 [UK], ss. 68, 69
Rules of the Supreme Court [UK], O. 24 r. 15

Other source(s) referred to:
Criminal Law in Singapore and Malaysia: Text and Materials, p 34
Black's Law Dictionary, 6th edn, p 1072
Evidence, Cross, 3rd edn, p 252
Impeachment Proceedings, Datuk S Augustine Paul, pp 69-73
Royal Commission on Capital Punishment, HMSO 1953, para 53
Sarkar on Evidence, 13th edn, pp 1400, 1401

For the accused - Jagjit Singh; M/s Jagjit Singh & Co
For the prosecution - Datuk Rahim Uda DPP

Reported by Farah Naim & WA Sharif

JUDGMENT

Suriyadi Halim Omar J:

The former Melaka State Executive Councillor, Datuk Hj. Sahar Arpan who is also the State Assemblyman for Durian Tunggal, faces three charges of having committed corrupt practice by using his public position for his pecuniary advantage. If found guilty, he will thereby have committed offences punishable under s. 2(1) of the Emergency (Essential Powers) Ordinance No.

22/1970, with a maximum jail term of 14 years, or a fine of not more than RM20,000 or both, for each charge. The three charges levied against him in brief read:

1. as a Member of the administration he had committed corrupt practice by using his public position for his pecuniary advantage when he participated in a decision of the State EXCO to approve an application by Ivory Heights Sdn. Bhd. for two pieces of land in the district of Bertam and Bacang in Melaka Tengah at about 10.00a.m. on September 7, 1994;

2. as a Member of the administration he had committed corrupt practice by using his public position for his pecuniary advantage when he participated in a decision of the State EXCO to approve Ivory Heights Sdn. Bhd's application to change the lease from 60 years to 99 years for the two said areas of Bertam and Bacang on December 21, 1994; and

3. as a Member of the administration he had committed corrupt practice by using his public position for his pecuniary advantage when he participated in EXCO deliberations on August 23, 1995 to expand the approved area of the land in Bertam from 3.3718 hectares to 3.6204 hectares and the land in Bacang from 6.8230 hectares to 7.2019 hectares.

Having perused the charges, I was satisfied that the particulars and ingredients required by law to be inserted in them, had been satisfactorily complied with. Some of the common terminologies that do require elucidation in this judgment will be terms in the like of:

1. Member of the administrations

2. committed any corrupt practice; and

3. pecuniary advantage.

This approach of clarifying and defining issues of common terminologies at the outset, hopefully will assist me in avoiding any repetition in explaining the ingredients. When and where necessary, I shall revert and cross refer to this part of the judgment.

Under Ordinance 22, "Member of the administration" has the meaning assigned to it in art. 160(2) of the Federal Constitution, where in relation to a State, includes a Member of the Executive Council. For easy reference I reproduce this article, which reads:

> "Member of the administration" means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, *in relation to a State, a person holding a corresponding office in the State or holding office as member (other than an official member) of the Executive Council;* (emphasis supplied)

A case with near similar set of facts which may be of assistance, and deserving mention is that of *Public Prosecutor v. Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245. As it was proved that Muslim was a Member of the EXCO, and duly elected as a State Assemblyman for the Kedah State constituency of Kuala Ketil, the court accepted him to be a Member of the administration. Returning to the current case, as Datuk Hj. Sahar Arpan has been proved to be a duly elected State Assemblyman, and a former Member of the EXCO, by analogy at the relevant time he was therefore a Member of the administration (see also *Public Prosecutor v. Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166).

Following the sequence as indicated previously, I now will attempt to broach the terminology of "corrupt practice". Section 2(1) of Ordinance 22, defines it as:

> any act done by any Member or officer referred to in sub-section (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; and without prejudice to the foregoing, in relation to a Member of a State Legislative Assembly includes any act which is contrary to the provision of sub-section (8) of section 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution of a State;

Raja Azlan CJ (as he then was) in *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230 at p. 245 pointedly said:

> After carefully examining the definition we are of the opinion that the question should be answered in the negative, that is the definition of "corrupt practice" in the Ordinance is not exhaustive but extensive. In properly considering the definition the words "without prejudice to the foregoing" appearing before the second limb of the definition are important. These words indicate the general intendment of the first limb of the definition. In fact the extensive character of the definition is further enhanced by the use of the word "includes" immediately after the words "in relation to a Member of a State Legislative Assembly" appearing in the second limb of the definition. The word "includes" is normally used to enlarge the ordinary meaning of a word or phrase beyond its accepted meaning as opposed to the use of the word "means" which is used if the definition is intended to be exhaustive – see *Caldow Props v. Low Ltd.*

Hashim Yeop A. Sani J in *Public Prosecutor v. Dato Haji Mohamed Muslim (supra)* at p. 247 regarding the scope of the intendment of the law, said:

> From the definition of "corrupt practice" it is clear that what the law aims to strike at is any act done by a member of the Administration or public officer whereby he has used his public position or office for his pecuniary or other advantage. In other words the law aims to strike at every act of a member of the Administration or public officer which amounts to an abuse of his public position or office for his personal advantage.

Apart from the liberal treatment and scope given to the ingredient of "corrupt practice" by the highest court of the land, the promulgation of Ordinance 22/1970 surely must reflect the seriousness of Parliament to combat corrupt administrators and political leaders in this country. To restrict the scope and usage of this Ordinance, would surely go against its very spirit. Chang Min Tat FJ in *Public Prosecutor v. Datuk Tan Cheng Swee & Ors*. at p. 178 in no uncertain terms said:

> The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.

I am now left with the definition of "pecuniary advantage", which is one of the ingredients of "corrupt practice"; and needless to say the current charges. In *Nunis v. Public Prosecutor* [1982] 2 MLJ 114, where the accused had used his public office as a member of the Lembaga Pengurus Kerajaan Tempatan Pulau Pinang, Abdul Hamid FJ (as he then was) concluded that the accused had abused his public position when he assisted his brother-in-law. There the accused recommended the purchase of certain equipments from a firm wholly owned by his brother-in-law, at a price higher than the price for which they could be obtained from another firm. His Lordship at p. 117 said:

> There is to my mind no mystery in the word "advantage". The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary. If a public officer abuses his public position to advance a private or personal interest whereby it is accrued to him either a pecuniary gain or benefit or something which is personally beneficial to him even though someone else may derive direct benefit from it, that advantage is, in my view, the kind of advantage that the legislature has in mind.

As for the expression "pecuniary", it must be in relation to benefits obtained by an accused person which may be valued in monetary terms, to include financial debt or obligation which is released, reduced, evaded, deferred or redeemed partially or wholly, immediate receipt of benefits, credit or cash, and further or future credit and/or benefit. This expression, after harmonising it with the terminology of "advantage", as defined by other eminent judges, will make sense of the expression "pecuniary advantage". Without limiting the scope of this terminology, at the very least it must mean a gain or benefit which may be valued in monetary terms, personally beneficial to the accused person eventhough someone else may derive direct benefit from it.

Circumstantial Evidence And Approach By The Prosecution

Having analysed the totality of the evidence adduced by the prosecution, I was convinced that there was no actual direct evidence to link the accused with Ivory Heights, the relevant company in the charges. That being so, and admitted by both the contending parties, the case of the prosecution would therefore have to depend entirely on circumstantial evidence. Whatever form the prosecution wished to pursue, be it direct or circumstantial, anything less than a beyond reasonable doubt case would be insufficient. To depend on circumstantial evidence, however onerous is not an impossible task, though easier to attract an acquittal pursuant to this course of action. This is so as the strength of the combined evidence that has to be adduced by the prosecution, be it documentary or oral, or by some other form, must irresistibly point to a conviction of the accused. If there is any room for doubt as to the quality of the evidence, be it in its admissibility or its intrinsic quality, which may lead to some other probable conclusions, then it cannot be said that the circumstantial evidence adduced so far, did point irresistibly to a conviction. Let us proceed and scrutinise the evidence so far adduced.

I begin by highlighting the infant stages of the purchase of the relevant company called Ivory Heights Sdn Bhd (hereinafter called "Ivory Heights"), which was incorporated in Kuala Lumpur. This was a RM2 company, with one A. Raniamal and Ng Bee Chin as the original shareholders-cum-directors. It was sold on 22 February 1994 for RM1,700 to one Puan Shamsiah Ayub, an administrative officer of an accounting firm. The latter confirmed that she sold the company subsequently to the accused after he had selected it from a list of names in February 1994. It was in compliance with his instruction that she bought that company. She further testified that after contacting the accused for payment, a cheque was sent through someone. The next relevant witness who mentioned the name of the accused was Mustadza Abu Bakar, a company secretary, who said that Datuk Hj. Sahar Arpan had asked him to handle the purchase of Ivory Heights. He was also asked to resolve the appointments of Md Yusop Omar and Jaini Ahmad as directors of Ivory Heights, replacing the two previous directors. This witness clearly indicated that it was the accused who supplied the names of the new directors. Apart from that, Mustadza testified that the accused had physically handed over documents required for the change of directors and shareholders, sometime in February 1994 when they met. He also confirmed that he later signed a form, to notify the appointments of Luwe Sang Kau and Othman Kassim as the new directors of Ivory Heights, in substitution of Md Yusop Omar and Jaini Ahmad in April 1995. He admitted not knowing Md Yusop Omar and Jaini Ahmad nor having had any official dealings with them.

In the hope of strengthening the prosecution's case, Md Yusop Omar and Jaini Ahmad were called upon to testify. In the process they gave conflicting testimonies and I thereafter granted the prosecution's application to impeach them. I will touch on this topic in detail later but under a separate sub-heading. The partner of Mustadza Abu Bakar, one Rohana Mohd Amin, testified that she had come into contact with the accused whilst in the process of handling the affairs of Ivory Heights. She stated that the accused had even gone to her office to personally settle the secretarial services' bills. A clerk from Mustadza's office, ie, one Suhaibah bt Martawel admitted compiling the documents for Ivory Heights, to be collected by the accused's driver.

The administrative efficiency of the registrar of company came under fire when its assistant registrar, one K. Mariasoosay gave evidence. He admitted that, eventhough the application forms of the change of directorships in Ivory Heights were submitted three years earlier, the filming of the forms was only carried out on 2 January 1993. This witness did admit that the records in the registrar of company were to a certain extent not properly kept.

The next phase of the prosecution's case was the highly contentious applications of two pieces of government lands at Bertam and Bacang by Ivory Heights. If successful an aquaculture project would be carried out on them. A senior Fisheries Department officer, one Ismail Abu Hassan (PW17), admitted that his Department had initially objected to the applications as the relevant lands were unsuitable for aquaculture. He later shifted his stance after receiving a call from one Amran Mohd Yusof (PW19), an officer of the State Drainage and Irrigation Department. Ismail was requested by Amran to reconsider his stance as the applications were submitted by the accused. He reviewed his decision on the basis that eventhough the two lots were unsuitable for aquaculture, with the advent and application of the latest technology, the acquaculture project could still be implemented. He further admitted that such a support by him would protect the good relationship between his Department and the accused. Amran Mohd Yusof confirmed that he did receive a telephone call from the accused, and did discuss the latter's applications. He was instructed by the accused to contact Ismail Abu Hassan and convey the message that the applications were submitted by his "anak buah". He complied with those instructions. It transpired from the evidence that the Majlis Perbandaran Melaka Bandaraya Bersejarah and the Town and Country Planning Department had also opposed the two applications. En. Mohd Fadzil Mohd Khir, the former director of the latter Department, clarified that the applications were opposed to as the accused's project would run counter to the government's plan to beautify the Melaka River.

Other relevant government witnesses merely testified on the pertinent administrative procedures to be complied with in connection to the applications. Much court's time was taken up by the explanation of the laborious acts undertaken by government officers prior to the transmission of the applications to the State Executive Council (EXCO). A former Melaka Tengah Assistant District Officer, one Sulaiman Harmain Shah, confirmed receiving from the State Lands and Mines Department a letter conveying the EXCO's decision of having granted a 60 year lease for the relevant lands. He further stated that on 4 January 1995 the district office received another letter from the same Department, informing of the EXCO's approval to permit the conversion of the leasehold to 99 years. He informed the court that after a valuation exercise had been undertaken, the company was told to pay RM283,635 as premium, with an additional RM1,064 as other expenses. Sulaiman Harmain Shah evinced further receiving a letter from the State Lands and Mines Director, informing of the EXCO's approval expanding the two lots in Bertam and Bacang to 3.6204 hectares and 7.2019 respectively. This expansion entailed an additional premium of RM18,553.98, subject to the lots being used only for fish rearing. Also no transfers would be permitted unless prior approval was obtained from the State. This former Melaka Tengah Assistant District Officer confirmed that the premium was paid by cheque. These two pieces of land were later valued at RM573,000 by Encik Hamid Abu Bakar, a former State Valuation Director.

The next important stage for purposes of the sequence of events arranged by the prosecution was with regard to the relevant State Executive Council meetings. Mat Sor Udin (PW37) who attended the EXCO meetings as a Secretary, tendered the EXCO papers (P112-P117). The learned counsel for the accused not surprisingly, objected on the premise of their inadmissibility. The State Land and Mines Department Deputy Director, one Abdul Karim Ismail, admitted being present in the EXCO meeting held on 23 August 1995 which considered the applications by Ivory Heights to vary the size of the two relevant pieces of land.

The EXCO Papers

In England certain evidence may be excluded if such inclusion in a trial may be injurious to the interest of the public (s. 28 of Crown Proceedings Act 1947; O. 24, r. 15 Rules of the Supreme Court). Cross in *Evidence* 3rd edn at p. 252 authored:

> ... the production of a document may be withheld in the public interest either on account of its contents, or else because it belongs to a class which, on grounds of public policy, must as a class be withheld from production (e.g. departmental minutes).

Field J in *Hennessy v. Wright* [1888] 21 QB 509 at p. 512, when dismissing the application for the production of certain priviledged documents, in no uncertain terms said:

> First the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown were liable to be made public in a court of justice at the instance of any suitor who thought proper to say *"fiat justitia ruat caelum,"* an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice.

Due to the nature of the law in this area which is in a state of flux, courts have changed their minds from time to time, not only regarding the terminologies used but even the documents that may or may not be allowed to be disclosed. Some terminologies only saw a limited span of life. As an example the term "crown priviledge", within a short span of time metamorphosised to "public interest immunity" (*Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All ER 617 at 623; *R v. Chief Constable of West Midlands ex p Wiley* [1994] 3 WLR 433 at 450). As a result of the balancing act carried out, between the rationale for the existence of such ground of immunity, *vis-a-vis* the need to ensure candour and uninhibited freedom of expression, even the likes of Cabinet minutes are not completely immune from disclosure (*Air Canada v. Secretary of State For Trade (No 2)* [1983] 2 AC 394 at 432).

In Malaysia, apart from the protection accorded to certain documents by statutes eg, the Official Secrets Act 1972 (Act 88), the Evidence Act also has been streamlined. Section 123 of the Evidence Act provides:

> No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a [department of a State government].

Additional to the above provision is s. 162(2) which reads:

> (2) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.

Under s. 8 of Act 88 any wrongful communication of official secret documents will expose an offender to prosecution, and if found guilty shall be punished with incarceration, for a term not less than one year but not exceeding seven years. Section 2 further provides that "official secret" is to be interpreted as any document specified in the Schedule and certain information and material that have been given certain classifications. Under the Schedule, *inter alia,* are found "State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees". Therefore, documents that have emanated from the respective meetings indicated in the Schedule are accorded total protection, unless waived. Once the documents are allowed to be produced as evidence, and the prosecution wishes to have them tendered in court, then the full effect of the provisions of the Evidence Act must be complied with (see *Takong Tabari @ Takung Tabari (Suing in her Personal Capacity and as Administrix of the Estate of Jeffrey Satuk Gabaar, Deceased) v. Government of Sarawak & 3 Ors* [1995] 1 CLJ 403; [1994] 3 AMR 2768).

To reiterate, having scrutinised P112-P117, I was satisfied that these were original documents which came within the terminology of "official secrets", provided for under s. 2 and strengthened by the Schedule. The fact that they were tendered by the secretariat of the State Executive Council (ie, by Mat Sor Udin (PW37)), must mean that the government had waived that protection priviledge. I was satisfied beyond reasonable doubt that these were EXCO documents, as they were approved and endorsed by the members of the EXCO at the next respective rounds of meetings. If I may add, as provided for under s. 114(e) of the Evidence Act, I am entitled to presume that any official work done had been regularly performed. PW37, the Secretary of the meeting, is the proper person to tender these exhibits, as not only was he present then but had had custody and control of these documents all along. Due to the very classification of them being EXCO materials, related minutes, records and documented acts of PW37 were not allowed to be tendered inspite of the request of the accused. These related documents, easily come within the ambit of "records of decisions and deliberations including those of State Executive Council committees", as specified in the Schedule of the Official Secrets Act. To make matters worse for the accused these related documents were unavailable.

PW37 in the course of the hearing, agreed that any declaration of interest made by an EXCO member present pertaining to the matters under discussion would have been noted in his minute books. He confirmed that no one at the EXCO meetings of 7 September 1994, 21 December 1994 or 23 August 1995, made any declaration. This witness also confirmed the accused's attendance on those dates. He adverted in a large way to P112-P117 when replying to questions

put forth by both parties. Perusing P112, P114 and P116 which dealt with the meetings of 7 September 1994, 21 December 1994 and 23 August 1995 respectively, I was satisfied that documentarily the accused was present on all those dates and sessions. As to whether there was any independent witness who could remember the accused's presence, without resorting to those minutes, only the former Lands and Mines Department Director, Ahmad Kushairi Abdullah could confirm of the accused's presence on 7 September 1994. Apart from confirming that the accused did not declare his interest during those dates, PW37 also said that the accused did not leave the meeting room during those sessions. The relevancy of these two factors, *viz,* declaring his interest and leaving the room at the material time, will be fully appreciated by the subsequent cases.

In the case of *Wong Voon @ David Wang Chang Vun v. Public Prosecutor* Criminal Appeal No. 24 of 1984, in the High Court in Borneo at Kota Kinabalu, Dato' Hj. Abu Mansor bin Ali J (as he then was) said:

> As I have said earlier Regulation 3 of the Public Officers (Conduct and Discipline) Regulations 1971 can only work, if it were to achieve the desired result of preventing conflict of interest, if the two steps I have mentioned are adhered to without fail, *viz*; there must be declaration of interest and, what is most necessary, the completing step of disqualification divorcing the party interested completely of the necessity of having to make the decision or choice.

In *Public Prosecutor v. Datuk Tan Cheng Swee (supra),* the accused who was the Commissioner of the Melaka Municipal, not only did not declare his interest in a company called Almac, but had also participated in approving the plans submitted by it. Their Lordships declared that eventhough the plans were found to be in good order and had been recommended, the doing of an act forbidden by law, supplied the *mens rea* as against the accused. Similarly in *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor,* the accused was found guilty as he participated in the deliberation of an application for State land in the Mukim of Linggi, Alor Gajah, which eventually benefited him. He then was a Member of the administration, to wit a Member of the Executive Council of Melaka State.

Statutorily, the law is silent as to whether a Member of the administration, having an interest in the matter under discussion at an EXCO meeting, ought to declare that interest. This lacuna was resolved when Hashim Yeop A Sani J (as he then was), discussed it in some detail in *Public Prosecutor v. Dato Haji Mohamed Muslim bin Haji Othman (supra)*. He took a stern view and held that the physical presence of the accused at the relevant EXCO meeting, which approved the application, was sufficient in the circumstances to be regarded in law to have used his public position or office for his pecuniary or other advantage. His silence did not make him any less an actor in the

play. The court came to this conclusion inspite of the fact that the land application by the accused had already been duly processed, and a piece of land had already been alloted to him by the Land Office of Kuala Muda. The alloted land was in an area which had already been ear-marked for senior government servants, EXCO members and State Assemblymen. To top it, the land committee had approved his application even prior to the deliberation and approval of the EXCO. Perhaps due to these factors, Muslim openly submitted his application papers. When the EXCO met on the material date he was present. Everyone present knew of his interest. It was just a mere question of affirming and rubber stamping the application. His sin was for being present, albeit silently, and failure to declare his interest. Inspite of all these saving grace factors, he still was regarded in law to have capitalised on his position or office for his pecuniary or other advantage. Without being argumentative, the views of Hashim Yeop A Sani J could certainly be justified by the doctrine of collective responsibility. In the State of Melaka, this doctrine is provided for under art. 7(3) of the State Constitution, a provision quite similar to that of art. 43(3) of the Federal Constitution. The former article, in crystal clear terms, provide that the Executive Council shall be collectively responsible to the Legislative Assembly. This is taken to mean that the EXCO must speak on policy with one voice, with the accused being an integral part of it. He cannot now argue that he had nothing to do with the outcome of the decisions of those meetings.

The only benefit of the doubt that I could bestow on the accused was that in the course of the meetings he had remained silent. This was so as PW37 did not go beyond the EXCO documents. On the other hand I was convinced that he never declared his interest. With that backdrop, the relevant consequential question that I had to consider was, if not for the fact that the accused was present in those meetings, bearing in mind the objections prevailing, would the applications have succeeded? It is reasonable to expect, barring exceptional circumstances, whenever there are objections to an application, and with the EXCO being unaware of the applicant, in all probability that application will be turned down. In the current case, two major government departments had expressed their vehement objections, particularly the Majlis Perbandaran Melaka Bandaraya Bersejarah and the Town and Country Planning Department. The latter objected on the premise that that area should not be developed, for fear of toxic material flowing into the catchment area, especially effluence from industrial waste. In the current case, the accused had remained silent (as there was no evidence to indicate that he spoke out during the meetings) but yet the applications still met with success. On that premise the intimidating presence of the accused must have had a profound influence over those meetings.

Scrutinising *Muslim's* case from another angle, I picture a hypothetical scenario where a minimum of 10 companies were needed by the state government to undertake a certain project, but attracting only five companies. One of the five was that of the accused's company. In that situation, regardless of his presence, in all probability all the companies would be successful, inclusive of the accused's. Adhering to the principle enunciated in *Muslim,* and for that matter *Public Prosecutor v. Datuk Tan Cheng Swee,* if the accused were present in that meeting, in all certainty he would be construed as having abused his public position. By analogy, I could not imagine Datuk Hj. Sahar Arpan will be successful in distancing himself from the views of Hashim Yeop A Sani J, especially in the light of objections to the applications.

The next interesting evidential stage was when Tay Kim Pong, the chairman of Polypac Plastics Sdn. Bhd., adduced evidence of having been approached by a person called Luwe Sang Kau, recommending him to buy two pieces of land owned by Ivory Heights. On the promise that these plots would eventually be converted into industrial land, he agreed to buy them. From the notes of evidence it is quite clear that the original intention of merely purchasing the two plots metamorphosised to that of buying the shares of Ivory Heights. In the cross-examination, he admitted that after assessing the situation he decided to buy that company. He agreed that by buying the shares he would also possess the two plots of land. This altered intention is corroborated by the receipts issued by Messrs S.K. Khoo (P125), and also the sale and purchase agreement dated 10 May 1995 (P127), signed by him and Othman bin Kassim. As far as the purchaser was concerned, the vendor was one Othman Kassim, a person not known to him. Permit me to clarify at this stage that as Othman Kassim only held one ordinary share in Ivory Heights, it meant that he only owned ½ of this company. Returning to the facts, Tay Kim Pong admitted making two payments totalling RM1.02 million even before the sale and purchase agreement was signed. His first payment was on 29 March 1995 for a sum of RM142,349.50, with the second totalling RM880,021 on 12 April 1995 at Messrs. S.K. Khoo's premises. Out of this substantial payments, RM284,699 was for the premium whilst RM737,671.50 forming part of the deposit and part payment of the total price. He admitted signing the sale and purchase agreement on 10 May 1995 in the abovementioned solicitor's office without the presence of the vendor. It was only a few days later that Othman Kassim executed the agreement. As regards the terms, Mr Tay Kim Pong left everything to Luwe Sang Kau and Messrs. S.K. Khoo.

It was agreed by both parties that the total consideration sum of that transaction would be RM2,743,604 million, conditional on the vendor succeeding in having those plots converted into industrial land. Under the current status, only RM1,022,370.50 was required to be paid. This sum, needed to be paid upon

the signing of the sale and purchase agreement, in actuality had already been paid earlier, comprising the abovementioned RM142,349.50 and RM880,021. The balance of RM1,721,235.50 would be paid after conversion. If the conversion was not obtained the matter ended there. As far as Tay Kim Pong was concerned, he was exceedingly confident that the conversion approval would be forthcoming, hence his willingness to part with such a large sum of money. At this stage of the testimony, even I let slip a remark that Luwe Sang Kau must certainly be a man of some remarkable qualities.

The relevant solicitor confirmed preparing the sale and purchase agreement and having received those payments from the purchaser. From the second payment of RM880,021, a sum of RM737,671.50 was defrayed to Othman Kassim. Out of this latter sum, RM200,000 was deposited by him into his personal account at the Chung Khiaw Bank. The balance was deposited into the Overseas Chinese Banking Corporation branch on 21 April 1995. He further instructed that RM250,000 be deposited into his wife's account, whilst another RM287,671.50, into his current account. Those accounts, by some mysterious coincidence were opened on the same day although earlier. Subsequently, Othman withdrew RM260,000 from that same account, together with another RM240,000 from his wife's, and thereafter converting them into fixed deposits. These fixed deposits which totalled RM500,000 were subsequently liquidated, and administratively returned to the respective abovementioned current accounts. After these two transactions had been completed, two cheques worth RM500,000 were handed over to Luwe Sang Kau by Othman Kassim, to be transmitted to the accused, supposedly a part of the purchase price of the accused's lands at Macap, bought by Othman Kassim. (Hereinafter will interchangeably refer to the latter purchase as lots 2253 and 2482 transaction whilst the events leading to the setting up of Ivory Heights, its applications of the plots of land at Bertam and Bacang, and the eventual sale of the company, collectively be referred as the Ivory Heights transaction).

Othman Kassim in his testimony evinced that prior to the signing of the sale and purchase agreement, the accused had telephoned him requesting P45 (Form 48A) be signed by him. When he signed it near Jaya Jusco, he did so without even perusing the contents. As regards the sale and purchase agreement signed at the lawyer's premises, he did so only after the relevant lawyer had explained the contents. He admitted handing over the abovementioned cheques worth RM500,000 to Luwe Sang Kau, who had acted as a broker for the payments of the alleged lots 2253 and 2482 transaction. This witness further confirmed that he had bought the two plots of land for RM675,000 from the accused, with RM67,500 paid as the initial deposit. The balance of RM107,500, after having taken into account the RM500,000 and that RM67,500, was alleged to have been paid by a Public Bank Berhad's cheque, sometime on 31 May 1997.

No prosecution's witness met with more derision from the prosecution than Othman Kassim. He was painted as an accomplice for having assisted the accused in his dastardly plans. The prosecution further ventilated that this accomplice had deliberately attempted to extricate the accused from every sticky situation imaginable, from day one until the completion of his testimony. Inspite of the unsavoury remarks uttered against him, the prosecution had unashamedly requested the court to accept parts of his evidence and to reject the partial ones. The accused's counsel on the other hand stressed that it was imperative that he be treated like any other witness. In the course of the submission, pertaining to evidence obtained from an accomplice, the prosecution submitted these cases for my consideration, among them, *Re Soo Leot* [1956] 22 MLJ 54; *Davies v. Director Of Public Prosecutions* [1954] 1 All ER 507; *Public Prosecutor v. Datuk Hj Harun bin Hj Idris (No. 2)* [1977] 1 MLJ 15; and *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1981] 2 MLJ 230. Without the necessity of producing a dissertation of the meaning of accomplice, I am satisfied beyond reasonable doubt that Othman Kassim is a *participes criminis* in respect of the charges against the accused. He is construable as an accessory to all the three charges and therefore could be indicted jointly for the offences. Evidentially, he made his first appearance in this drama on 31 March 1995, five months before the EXCO's deliberation of 23 August 1995. Thereafter there was no end to his assistance in helping the accused in his nefarious agenda.

Inspite of this label, the law is silent that every shred of evidence adduced by an accomplice must be disregarded, comparable to the evidence of an impeached witness. In fact s. 133 of the Evidence Act in crystal clear terms promulgate that such a witness shall be a competent witness against an accused person; and a conviction is not fatal merely because it proceeds upon the uncorroborated testimony of an accomplice. On that premise, an accomplice's evidence stands on the same footing as any other evidence. Taking a step further, alluding to the submission of the accused, even the evidence of an ordinary witness does not have the benefit of being believed in entirety. A court is competent enough to sieve such testimony and to receive only the relevant part, founded on cogent reason, after sufficient scrutiny has taken place. It was on those premises, and after having forewarned myself of the dangers of accepting the uncorroborated evidence of an accomplice, that I sifted and considered Othman Kassim's evidence.

To complete the cycle and the events as laid down by the prosecution, witnesses testified that Datuk Hj. Sahar Arpan deposited two cheques worth RM500,000 into two saving accounts in LUTH, split between his account and his wife's. The cheques were subsequently cleared. Witnesses from LUTH also came forward to explain the procedure and processes of printing the statements of accounts of depositors in that institution, including that of the accused's and his wife.

The chain of evidence systematically produced by the prosecution had successfully retraced the RM500,000 received by the accused, all the way back to the cheque of RM737,671.50 issued by Messrs S.K. Khoo (and of course connected to the Ivory Heights transaction). These accelerated payments received by the accused, later credited into those LUTH'S accounts, were certainly a pecuniary advantage as envisaged by the Ordinance, obtained by virtue of the exploitation of his position as a Member of the administration. I have no hesitation in enunciating that the scope of the term "advantage" is certainly wide enough to include the benefits obtained by the accused, as supplied by the current set of facts. The presiding judge in *Nunis v. Public Prosecutor (supra)* in clear terms said '... "advantage". The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary ...' I have no compunction in postulating that the speed of the payment which was expeditious, let alone the actual receipt of RM500,000 was a benefit or gain of some kind which fell squarely within the terminology of "advantage". At the risk of repeating, due to the extensive effect of this term as clarified above, the adjective "pecuniary" will be redundant and superfluous. Even if I were to err in holding this view, the prosecution's case regarding this ingredient would still fall surely within the ambit of the phrase "pecuniary advantage".

By way of *obiter*, there is nothing in s. 2 which delineates that whenever an offender uses his public position or office, the legal beneficiary, in this case Ivory Heights, must be owned by the offender. To bring the accused to book successfully, the prosecution in a gist, must prove that he assisted the company by using his office and subsequently rewarded pecuniarily. In fact the reward need not necessarily emanate from that company itself; it could also come from a third party or other source, but received as a consequence of the corrupt practice of the accused.

Highly pertinent to this case, and which required serious consideration, was the question whether the lots 2253 and 2482 transaction was genuine. To answer this, a review of the combined evidence surrounding the sale of the Macap lands and the sale of the company became necessary. I began with the assessment of the evidence regarding the sale of the company together with the lands it owned. The sale and purchase documents indicated that the RM2,743,604 million was to include the additional payment in the event conversion to industrial lands were successfully attained. On the basis of an "agricultural land" status, the value of those lands were recorded at RM1.02 million, indicating that Mr. Tay had paid the purchase price in full. Mounted into this sum, was the payment for the premium. If Mr. Tay had intended to purchase a mere ½ share of the company ie, Othman Kassim's portion, logically his contribution would be 50% of the premium, and RM368,835.75

for ½ ownership. Therefore, if Mr. Tay had paid RM1.02 million, then he would have bought a 100% stake in Ivory Heights. If Othman Kassim merely had 50% ownership of the company, why then did he receive that full purchase price of that company, without a single cent channelled to Luwe Sang Kau? From these facts, two compelling inferences could be arrived at, first, Luwe Sang Kau was not the half owner of Ivory Heights, and secondly Othman Kassim was the sole owner. Yet Othman Kassim's testimony and the documents pertaining to this company, bespoke of him as being the half owner. The irresistible conclusion is that Othman Kassim had lied. The end product of this lie, combined with the other evidence adduced by the prosecution, convinced me completely that he never owned Ivory Heights. What are the other evidence?

I start off with the blind faith of several witnesses involved in the Ivory Heights transaction, particularly the events which led to the buying of the supposed ½ share of the company. Conspicuous to this issue were:

1. Tay Kim Pong paid only RM142,349.50 as at 29 March 1995 but yet Messrs. S.K. Khoo, on 3 April 1995 willingly risked advancing the full payment of RM284,699 for the premium, as confirmed by P80 (acl-4). Tay Kim Pong only paid up the rest of the purchase price ie, RM880,021 on 12 April 1995. Eventhough there was an attempt to show that Tay Kim Pong refunded the advance, it was incontrovertible that the latter paid the full premium inspite of alleging that he purchased only a ½ share of that company;

2. the blind willingness of Othman Kassim to sign P45 (Form 48A) at the premises of Jaya Jusco on instruction of the accused, without even perusing it;

3. the repeated unusual willingness of Othman Kassim to sign a document, ie, the sale and purchase agreement (P127) pertaining to the transaction of that ½ share of Ivory Heights in Messrs. S.K. Khoo's office, when that was the first time he knew of the contents of the agreement. On that day a cheque worth RM737,671.50 (P128) dated 20 April 1995 was given to Othman Kassim;

4. the unbusiness-like willingness of Tay Kim Pong to pay RM1.02 million on 12 April 1995, when on 8 November 1994 the land was merely valued at about RM573,000 by PW26;

5. the unexplained reason as to why Tay Kim Pong paid for the full ownership of that company (or even for that matter the full premium), when Othman Kassim was supposedly only owning 50% of that company;

6. the willingness of Tay Kim Pong to completely and unreservedly depend on Mr. Luwe Sang Kau, when he was even oblivious of the latter's profession;

7. the complete and overwhelming faith of Tay Kim Pong that the conversion approval to industrial lands would be forthcoming;

8. the willingness of Tay Kim Pong to pay so much money, when he knew at the relevant time the material lands were "agriculture land";

9. the willingness of Tay Kim Pong to advance full payment by 12 April 1995, whence Othman Kassim only executed that sale and purchase agreement on 20 April 1995 (P127);

10. the willingness of Tay Kim Pong to close the deal, by signing the sale and purchase agreement in S.K. Khoo's premises, without ever meeting or seeing, let alone discussing with Othman Kassim; and

11. The willingness of the previous directors *viz.* Md Yusop Omar and Jaini to be dispossessed of their half share each, in a company which at that material time was worth at least RM½ million, for no consideration at all.

All these uncharacteristic human faith was so overwhelming and suffocating that it could only fuel my suspicion that there must have been present a pervading and powerful hand that would not disappoint them. I could not imagine Luwe Sang Kau to be that powerful force or for that matter Othman Kassim. The only name that kept popping up was YB Datuk Hj. Sahar Arpan.

If the lots 2253 and 2482 transaction were a genuine one, inspite of the exorbitant price, then money-wise, after the alleged deposit payment of RM67,500, a balance of RM607,500 would still be due to the accused. By all accounts, Othman Kassim as a debtor should be the very person to behave in a rather excitable manner, in the course of seeking out funds to pay the balance. Instead, not only was he oblivious of his financial predicament, but made no attempts to seek out the financial assistance. The accused, conversely who should have remained unaffected, behaved as if it were he who was in dire need of financial assistance. The very conduct of these two personalities therefore seemed to be inconsistent with logic and ran counter to all reasonable behaviour. This unusual conduct fortified my finding that this lots 2253 and 2482 transaction was but a concocted story, manufactured by Othman Kassim and the accused to enrich themselves. With the rejection of the lots 2253 and 2482 transaction, the receipt of the RM500,000 by the accused could not have been for the payment of that latter transaction. It was a story activated to camouflage the accused's corrupt practice.

Evidentially the supposed gold-mine like value of lots 2253 and 2482, was at odds with the evidence of other witnesses. They testified that the value of the relevant lands in the open market was a mere RM74,000, whilst the forced sale value at RM55,000. However vehement the accused had attempted to paint a scenario of Othman Kassim ever willing to pay at any price for the two lots, for reasons known only to him, hobby or whatever, I certainly was not convinced. These were leasehold properties which possessed short life spans. Bearing in mind that that area is located in a catchment area, with a dam surrounding it, it would be highly improbable that a tremendous upsurge in value will be experienced, let alone within such a short spell of time.

A rather damning piece of evidence was the fact that for a mere loan of RM55,000, both lots of 2253 and 2482 were required to be charged to the bank. Surely if those lots were priceless, one lot would have been more than sufficient to cover the loan.

Apart from the above factors, the subsequent facts will confirm once and for all the improbability of that sale. Othman Kassim affirmed that after having agreed to buy lots 2253 and 2482, a sum of RM67,500 was paid as deposit sometime in April 1994. I now lay down the following incontrovertible facts or documents in sequence which will neutralise the probability of the supposed transaction:

1. a letter dated 16 September 1994, sent by MBF Finance Berhad (see P159) to Bank Pertanian Malaysia Berhad clarified that the impugned lot of 2482 was still mortgaged to it. The letter also indicated that unless the balance sum of RM20,161.40 was paid up before 30 November 1994 no discharge of the mortgage would take place;

2. P164, the Pajakan Mukim of lot 2482 documented that on 21 September 1994 this lot was caveated by Bank Pertanian Malaysia Berhad. On 1 November 1994 the caveat was withdrawn. That date also saw this lot being charged to Bank Pertanian Malaysia Berhad and Choo Sook Pin transferring ownership of that lot to the accused. This second charge was only released on 21 February 1997;

3. P167, the Pajakan Mukim of lot 2253 documented that on 1 November 1994 this said lot was charged to Bank Pertanian Malaysia Berhad. The release took place on 21 February 1997; and

4. if by 2 June 1995 the accused had received RM567,500 from Othman Kassim, supposedly payments for the lots 2253 and 2482 transaction, then the question that begged to be asked was, why did the accused not redeem both lots when the amount loaned by Bank Pertanian Malaysia Berhad was a mere RM55,000? Any vendor would know that unless the lands

were cleared of all encumbrances, no banks would allow any transfer to the purchaser (see the comparable correct reaction of MBF Finance Berhad through P159).

The chronology of events, beginning with the charging of both the lots on 1 November 1994, seven months after supposedly having received a deposit from Othman Kassim, makes a mockery of the lots 2253 and 2482 transaction. The above sequence also convinced me that a concrete contractual agreement between the accused and Choo Sook Pin was yet to be formulated, thus rejecting the probability of the accused having been approached by Othman Kassim.

Additional Analysis On Payments By Tay Kim Pong Reflecting Othman Kassim's Conspiratorial Quality

At the risk of repeating the facts, Tay Kim Pong had altogether paid up RM1,022,370.50, comprising two payments, namely RM142,349.50 paid on 29 March 1995, and RM880,021 on 12 April 1995. Out of this sum, RM284,699 was utilised to pay towards the premium on 3 April 1995. The balance of RM737,671.50 was given to Othman Kassim who promptly deposited it into his account in Overseas Chinese Banking Corporation. He then directed the bank to deposit RM287,671.50 into his account, and RM250,000 into his wife's. The sum total was RM537,671.50. The balance of RM200,000 was withdrawn and deposited into his account in Chung Khiaw Bank. That large sum of money in the Overseas Chinese Banking Corporation was capitalised later when he converted RM500,000 into fixed deposits, with a resultant interest of RM2,526.24. After the fixed deposit had been liquidated the whole sum, together with the interest, was re-diverted into the same current accounts. Othman Kassim later drew out two cheques worth RM500,000, to be given to the accused *via* Luwe Sang Kau. So what happened to the interest of RM2,256.24 and RM37,671.50 (RM537,671 minus RM500,000)? After adding these two sums to the RM200,000, which he had deposited earlier into Chung Khiaw Bank, he had made a hefty RM240,197.74 without lifting a finger. Surely this was a far cry to the questionable intelligence of Md Yusop and Jaini, the previous directors. Nobody could accuse Othman Kassim of being a simpleton, and with no head for figures. His financial successes and his entrepreneurial ability further holds testimony of his engenuity. I would be the blindest of person if I fail to penetrate through the non-too intricate web, weaved by Othman Kassim and the accused, to spin money out of the position of the latter; Othman Kassim merely to lend his name and expertise to the scheme, whilst the accused to abuse his position and profit by it.

Additional Striking And Persuasive Evidence

(1) Consistency In Involvement

Learned counsel for the accused doggedly persevered with the submission that the assistance rendered by the accused for his constituents, was not unusual and was commonly practised by him by virtue of him being an Assemblyman. For a better understanding of his involvement as regards the Ivory Heights transaction, I will illustrate his enthusiastic contributions by highlighting these facts:

1. the accused contacted PW8 to fax him the names of a set of shell companies;
2. PW8 was informed later by the accused that he was interested in purchasing Ivory Heights;
3. after the company was bought over, the accused informed PW8 that he would send someone to make payments, and receive the relevant documents;
4. PW9 said that the accused asked him to appoint one Md Yusop Omar and Jaini bin Ahmad to replace the previous directors. These names were supplied by the accused;
5. On 11 March 1994 Ivory Heights applied for government land. In P80 ie, the file connected to those applications, a "thank you" card ie, P24A signed by the accused was retrieved;
6. PW17 received a call from PW19, requesting him to review his conclusions, and intimating that the relevant applications were made by the accused;
7. the accused was present in the meeting of 7 September 1994 which approved the initial applications of Ivory Heights;
8. the accused was also present in the meeting of 23 September 1994 which confirmed the approval of 7 September 1994;
9. the accused was also present in the meeting of 21 December 1994 which extended the period approved for PT463 Mukim Bertam from 60 to 99 years;
10. the accused was also present in the meeting of 28 December 1994 which confirmed the approval of 21 December 1994;

11. PW9 and PW10 were told to resign as the secretaries of Ivory Heights, on the instruction of the accused;

12. the accused personally came to the office of PW9 and PW10 and paid RM1,005 for the secretarial fees;

13. the accused's driver PW12, took the Ivory Heights' file (P32) from PW9 and PW10, and handed it over to the accused;

14. PW13 testified that he was contacted by the accused who asked whether a letter for Ivory Heights ie, P64 had been received by her office. The accused admitted to her that that letter was his;

15. PW13 further testified that she later telephoned the accused, informing him of another letter addressed to Ivory Heights. This time the accused personally came over to fetch it;

16. PW14 was contacted by the accused, enquiring of a letter for Ivory Heights. After admitting that there was one on her employer's table, she was instructed to hand it over to his agent (wakil);

17. sometime on 31 March 1995 the accused telephoned PW52 (Othman Kassim), instructing him to sign P45 (Form 48A);

18. this form (P45), brought by PW12 to be signed by PW52 near Jaya Jusco, was obediently returned to the accused by the former;

19. PW52 sold his rights in Ivory Heights to PW39 on instruction of the accused;

20. the cheque received by PW52, at the premises of Messrs. S.K. Khoo was later banked into his personal accounts. He was later instructed by the accused to draw up two cheques, each worth RM250,000, to be diverted to him. These cheques dated 2 June 1995, also on the orders of the accused, were handed over to Luwe Sang Kau;

21. on 8 June 1995 these very cheques (P138 and P143), found their way to the accused and his wife's accounts in LUTH;

22. on 23 August 1995 the accused was present in the EXCO meeting which modified the shape and area of PT463 and PT4799;

23. on 30 August 1995 the accused was present in the EXCO meeting which approved the 23 August 1995 meeting; and

24. on 18 October 1996 when the Badan Pencegah Rasuah raided the accused's house, a green file (P32), and a company stamp (P182) both bearing the name of Ivory Heights were seized.

Having appreciated the incredibly large number of times the accused got involved with this relevant company, right from the word go, I was expected to be naive and believe that his contributions were normal chores for an EXCO member. Substance is more important than format and no amount of name dropping could deny the ownership of the accused over Ivory Heights. He was the alter ego of the company. All the evidence points to his total awareness of the events that took place, with him always in command of the situation; and possessing the *mens rea* when assisting it in relation to the two pieces of land in all the three EXCO meetings. His reward which sealed his crime, came not only in its speed but in the amount and form.

(2) The Seizures Of P32 A Green File Containing A Large Number Of Documents, And P182 A Company Stamp, Both Owned By Ivory Heights, In The Accused's House

This green file was the very same file that was sent by PW5 to PW8 and later handed over to someone on the instruction of the accused. It later found its way to PW9 and PW10's offices, and thereafter handed to the accused's driver ie, PW12. This driver later handed it to the accused. This file (P32) was later recovered from the accused's house. And of course together with it was recovered P182 ie, Ivory Heights' stamp.

There was absolutely no tangible evidence before me which came close to explaining how P32 and P182 found their way to the accused's house, albeit agreeably during different times. As far as the court was concerned, evidentially P32 was last seen in the hands of the accused, when PW12 handed it to him. To be on the safe side, I took great pains to consider the relevant question as to why a file, practically containing all the relevant documents pertaining to Ivory Heights, and the very life line of that company could be with him. Even if the company stamp were defective, I found it highly extraordinary for it to be abandoned, especially at the accused's house. The learned counsel for the accused, attempted to explain away this negligence practically on Md Yusop's inadvertence. Considering the circumstances of the case, especially when the accused had denied that Ivory Heights was his, and bearing in mind how relevant those exhibits were to the company, that suggestion did not impress me in the least. To have dropped a company's stamp, eventhough defective was unusual, but to leave behind a conspicuously green and fairly large file, was diabolical. Certainly I could not succumb to naivety.

(3) The "Thank You" Cards

Wong Kong Yeong (PW4), a handwriting expert confirmed that P24A (thank you card), P26C (a letter from the accused to the Speaker of Dewan Undangan Negeri) and P27A (an application form for leave to perform the Hajj by the accused) were signed by the accused. Having considered the opinion of this

witness, together with this evidence, I was satisfied that the maker of P24A was the accused. This card intrigued me, as, if the accused was merely helping a member of his constituency, then surely the sending of a thank you card, later recovered in P80 (the Land Office's file), was another act which must be construed as over and above any normal assistance. Apart from this, it was observed that wherever the interest of the accused existed, thank you cards were sent eg, P159 connected to his bank loan; P160 and P162 related to a valuation report and the payment of that report respectively.

(4) Involvement Of The Accused In The Application Of The Land Per The Application Form Of P4A

PW1, a handwriting expert confirmed that the handwriting in P4A (application form for the land by Ivory Heights), was similar to P13A and P14A, both samples of the accused's handwriting. In other words P4A was filled by the accused. This view was conceded to by the learned counsel for the accused, though not the signature. Inspite of the concession of the learned counsel, it was still encumbent upon me to be satisfied beyond reasonable doubt, assisted by the views and observations of the expert of that fact. The object of an expert's evidence is merely to assist the court in arriving at some conclusion (*Devi Prasad and Another v. State* AIR [1967] Allahabad 64). Having considered the testimony of this witness and having perused P4A, I was convinced that the latter document contained his handwritings. The effect of this conclusion was that, on those meeting dates when P4A and matters connected to it were discussed, he knew that he had assisted in the filling of those documents.

Reminder

It must be emphasised that the supposed assistance rendered by him could not be considered in isolation but read together with the many others, which by all accounts were large. A singular act of kindness is normal and may be given an innocent construction. On the other hand, if the sum total of his involvement is abnormally large, I am at liberty to draw an inference that he was helping himself.

Impeachment Proceeding

Midstream during the stage of the prosecution's case, an interesting point of law surfaced as a result of two separate impeachment proceedings. It was initiated by the prosecution, when two of its witnesses namely PW15 and PW16 contradicted their previous statements. The legal poser that arose was in relation to the stage when the court should arrive at a decision whether a witness had been impeached or not. It was not disputed that these impeachment proceedings were made pursuant to sub-s. (c) of s. 155 of the Evidence Act.

(For convenience I shall refer to the applications in the singular). This meant that their credit worthiness or lack of it was to be attained by comparing the oral evidence in court, with the supposed contradictory statements made much earlier. This is so as the requirements of this subsection are very specific, in that the credit of a witness may only be impeached by resorting to his previous statements, and no more. It does not permit the introduction of other evidence, or for that matter to relate or compare them to other factors, except those provided within it. By virtue of the specific perimeters of this application, and its basis, apart from ensuring that the provision was strictly adhered to, I also had to ensure that there was no encroachment on the other subsections and *vice versa*. I also ensured that all parties, including the relevant witnesses, had not been denied of their rights. The proposing party ie, the party that desired to impeach those witnesses, the prosecution in this case, was permitted to question them whilst the defence counsel was also not denied that right of cross examination (*Paramasivam v. Public Prosecutor* [1970] 2 MLJ 106; but observe the view of Hashim Yeop A. Sani J when delivering the judgment of the Federal Court in *Public Prosecutor v. Munusamy (infra)*). The witnesses were also given their respective opportunity to explain away the contradictions. Thereafter, I played my part by arriving at a decision immediately at the conclusion of the impeachment proceeding, by concluding that material inconsistencies did exist.

Inspite of the relevancy of this provision to potential parties, be it for criminal or civil cases, it is unfortunate that the terminology of "statement" is not defined in the Evidence Act. Thankfully it has historically been construed very liberally by courts, encompassing different sorts of documents, eg, the statements of the witnesses under s. 112 of the Criminal Procedure Code (*Husdi v. Public Prosecutor* [1980] 2 MLJ 80; *Mathew Lim v. Game Warden, Pahang* [1960] 26 MLJ 89); cautioned statements of witnesses made to the police (*Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121), and previous statements contained in "public documents", as defined under s. 74 of the Evidence Act (*Pavone v. Public Prosecutor* [1986] 1 MLJ 72).

Much earlier, perhaps in anticipation or in preparation of his application, the learned Deputy Public Prosecutor had already elicited certain evidence capable of assisting him, to determine that there was some material difference between that elicited evidence with the previous statements made to the Badan Pencegah Rasuah. With that completed, the learned Deputy Public Prosecutor then applied to me for leave to impeach the witnesses' credit, primarily on the basis of the contradictory statements. The relevant passages were also meticulously marked as suggested by *Ong Joo Chin v. Rex* [1946] 12 MLJ SSR 1. When the statements were handed to me, not only had they already been marked by red ink but were separated from the other statements, with the latter hidden

by blank white sheet of papers. The procedure adhered by me did not detract from the procedures laid down in *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57. Having perused the statements and having compared them with the oral testimony, and being convinced that there were material contradictions, I unhesitatingly granted leave. Thereafter the proper impeachment proceedings began (see *Re Wee Swee Hoon, Decd; Lim Ah Moy & Anor v. Ong Eng Say* [1953] 19 MLJ 123).

When their attention were riverted to those previous statements, aside from drawing no denials, unhesitatingly identified their respective statements. With their admissions recorded I admitted those documents as exhibits for purposes of the impeachment proceedings. The learned Deputy Public Prosecutor subsequently drew their attention to the marked portions of the statements, and were asked to explain the material contradictions, with that of the evidence adduced in court. PW15 gave incoherent answers, and at one stage even said that he did not know the reasons for those contradictions.

PW16, on the other hand said that these statements were the Badan Pencegah Rasuah Officers' statements; and as a result of his unsettled state of mind, merely played along. I did not seek clarification as to which piece of evidence was creditworthy as that issue was irrelevant. What was important was to give those witnesses their respective opportunity, to explain the inconsistencies, and the material contradictions between the oral evidence and the previous statements.

I then requested the defence counsel to pursue with the cross examination of the witnesses, not only in relation to the answers obtained from the impeachment proceedings but also against their evidence in the substantive hearing, but declined to do so. Both parties also declined to submit and I left the matter at that. Unfortunately due to the legal niceties that could not be ignored, I directed both parties to make the necessary submissions, and in the course of the hearing, much to the credit of the contending parties, both agreed that the assessment of the credit of the witnesses should be made immediately. The only difference were the reasons and approach. After hearing their submissions I whole heartedly agree with their conclusions and thereafter made the consequential orders that PW15 and PW16's credit be considered impeached. It must also be stressed that the earlier statements could never be substituted for the evidence adduced in court already pronounced by me to be unworthy of belief (see *Public Prosecutor v. Lo Ah Eng* [1965] 1 MLJ 241; *Yusoff bin Sidin v. Public Prosecutor* [1971] 1 MLJ 203).

Reasons For My Decision Pursuant To The Impeachment Proceedings

Chapter 10 of the Evidence Act covers adequately the subject of the examination of witnesses, in particular to those who prove adverse to the party calling them. Two sections provided therein, namely s. 145 which relate to the cross-examination of witnesses by the calling party, whilst the other, s. 153, relate to the exclusion of certain evidence to contradict answers to questions when testing their veracity. Only s. 155 in exactitude is the relevant provision applicable for parties who are interested in impeaching their own witnesses or that of the opponent's.

It cannot be overly emphasised that by virtue of the manner the three subsections were drafted, Parliament in their wisdom must have wanted to bestow each subsection separate functions and to be mutually exclusive. To illustrate briefly, if an interested party desired to impeach a particular witness, without invoking previous statements, then that party need only invoke either sub-s. (a) or (b) of s. 155 of the Evidence Act, whichever is relevant. To trespass into another's territory or even to import ingredients or factors from the other subsections, surely would be against the spirit of s. 155. This view is held as under sub-s. (a) of 155, the impeachment is done by testing the credit of the challenged witness with the evidence of some other witness or witnesses, whilst under sub-s. (b), by proof that that witness had been bribed or had accepted the offer of bribe, or had received corrupt inducement to persuade him to give evidence.

For a fuller comprehension of the history and stages of the problem at hand, I will pursue the course of illustrating them by resorting to some authorities, beginning with the celebrated case of *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57. This case laid down the procedure for any impeachment exercise. *Paramasivam v. Public Prosecutor* [1970] 2 MLJ 106, in a rather hazy way also discussed this issue. In that case, at the lower court, the prosecution's witness was impeached by resorting to her previous statement at the end of the proceeding, without waiting for the close of the prosecution's case. A second controversial issue that cropped up there was the unwillingness of the learned Sessions Court judge to permit the defence counsel to cross-examine that witness. Chang Min Tatt J (as he then was) who heard the appeal, lost the golden opportunity when he still left the issue of when the assessment ought to be carried out, at large. The next case deserving attention is *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 where a prosecution's witness ie, PW18 was impeached at the close of the prosecution's case. More on this case later. In *Public Prosecutor v. Munusamy* [1980] 2 MLJ 133 the High Court heard an appeal emanating from the lower court. The relevant portion under scrutiny was that part where the learned

magistrate ruled that the evidence of PW16 was no longer a creditable witness as he had been impeached. Unfortunately as in the previous case the High Court "inadvertently" remained silent in giving any view about the issue at hand.

Trudging along, and to eliminate another alternative scenario, I find it necessary to discuss the case of *Public Prosecutor v. Tan Gong Wai & Anor* [1985] 1 MLJ 355, where Edgar Joseph Jr J (as he then was) opined that the decision whether a witness had been impeached or not, ought to be at the conclusion of the case ie, at the end of the defence case. This case is peculiar in its own right as it was suitable for that era by virtue of the legal enunciation that oozed from *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49. In a gist, this case viewed that as a decider of law the judge must consider whether there was some evidence which was not inherently incredible which, if he were to accept as accurate, must then call upon the accused to enter upon his defence. In the process he must maintain an open mind as to the accuracy of any of the prosecution's witnesses, until the defence had tendered such evidence. This Singapore case which was imported into Malaysia by *A. Ragunathan v. Pendakwa Raya* [1982] 1 CLJ 25; [1982] 1 MLJ 139, was confirmed later by *Khoo Hi Chiang v. Public Prosecutor and Another Appeal* [1994] 2 CLJ 151; [1994] 1 MLJ 265, though prior to *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597; [1997] 1 MLJ 1. These cases had to go through turbulent times before the *prima facie* case concept was revived by Akta Kanun Prosedur Jenayah (Pindaan) 1997 (Akta A979). It was due to those unusual reasons that *Public Prosecutor v. Tan Gong Wai & Anor* produced that view. On that premise due to the effluxion of time, and changes in our legal thinking, this particular case may be discounted for purposes of the issue at hand.

To complete the analysis of cases, the other set will be those that have reserved their decisions until the conclusion of the defence stage. A case in mind is *Public Prosecutor v. Tan Seow Chuan* [1985] 1 MLJ 318 where the impeachment proceeding was taken up by the prosecution during the defence stage. Since the circumstances and the stage were completely at variance with our current case, I therefore consider this set of cases to be irrelevant, and end the discussion forthwith.

I now proceed to the case of *Dato Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232, where at the Federal Court level the legal poser at hand was discussed by the very same judge who decided the case of *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (supra)*, and hence perhaps the consistency in the thinking. In *Dato Mokhtar Hashim & Anor* at the High Court level, the case was heard by Hashim Yeop A. Sani. J, who made the

finding immediately at the conclusion of the impeachment proceeding (see 264 para. B left hand). Since we are now discussing this case, I consider it appropriate to reproduce the relevant portion of Abdoolcader FJ's statement, in particular that of p. 277 which reads:

> Abdoolcader, J, took the correct approach in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors.* when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances. The procedure for impeachment should be on the lines set out in *Muthusamy v. Public Prosecutor* but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told in the lower courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately. We need only observe in reiterating the absolute fallacy of any such wholly unwarranted practice that a testifying witness cannot be dealt with and struck out or struck off *ex tempore* and in midstream at an intermediate stage of the proceedings as if he were a defective writ or pleading.

(see case of *Public Prosecutor v. Adnan b. Ishak* [1992] 2 CLJ 1234, where K.C. Vohrah J assessed his creditworthiness at the close of the prosecution's case, after having considered the above case). By scrutinising p. 277 between paragraphs C-G left, it is clear that Abdoolcader FJ disagreed with the time of decision, as practised by Hashim Yeop Sani J at the High Court level. To quote the relevant part, Abdoolcader FJ said:

> Abdoolcader, J, took the correct approach in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors.* when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution ...

Perusing further down the excerpt, when discussing the practices at the lower courts where no explanations were supposed to have been offered or accepted, would be in total variance with the practices of High Court judges (especially now). As in the current case, the witnesses were given the opportunity to explain the contradictions, and with the accused's counsels given also the opportunity to cross examine them. We also are not in the habit of striking *"ex tempore"* and in midstream, at an intermediate stage of the proceedings, as if he were a defective writ or pleading. To agree with the unusual remarks of His Lordship, for purposes of a criminal case, would tantamount or equivalent to discharging or acquitting the accused "midstream and at an

intermediate stage". Surely this view is slightly going overboard, especially in the light of the present facts, when in actuality the prosecution was merely impeaching the credit of two witnesses out of sixty-nine witnesses as produced by the learned Deputy Public Prosecutor, and no more.

Whether their credibility could be revived successfully later by certain forms of actions cannot be seriously considered now as no serious submission was made on this point by either party (see *Public Prosecutor v. Mustaffa bin Ahmad* [1986] 1 MLJ 302 and *Sarkar On Evidence* 13th edn, p. 1400 and 1401 for future consideration). (A point of interest to be noted too is that *Dato Mokhtar Hashim's* case comes under the Essential (Security Case) Regulation (ESCAR), which has its own special procedures, and having a different set of rules with regard to the burden of proof.)

Having had a thorough look at the above para. C-G of p. 277 of *Dato Mokhtar Hashim*, I am convinced that the view of His Lordship was said in passing or mere *obiter dicta*. *Black's Law Dictionary*, 6th edn, at p. 1072 supplies the meaning of *"obiter"* and *"obiter dictum"* respectively as:

> *"obiter"*: "by the way; in passing; incidentally, collaterally";
>
> *"obiter dictum"* reads:
>
> words of an opinion entirely unnecessary for the decision of the case. *Noel v. Olds*, 78 U.S. App. D.C. 155, 138 F.2d 581, 586. A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent. See *Dicta; Dictum.*

Edgar Joseph Jr in *Co-Operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd* [1997] 2 MLJ 829 at p. 836 (para. A) defined it as:

> ... *obiter dictum* is a mere chance remark by the court and is used in contradistinction to *ratio decidendi* – the rule of law for which a case is authority.

I leave the matter of definition momentarily and return to it after having discussed the case of *Dato Mokhtar Hashim* in some detail. A perusal of this case will show that this relevant paragraph was provoked pursuant to a matter involving the credit worthiness of one Abdullah bin Ambik (PW30), a prosecution witness who turned hostile, and completely resiled from his previous statement. An application was made by the Public Prosecutor to impeach his credit under s. 155(c) of the Evidence Act. During the proceeding, at the conclusion of the examination-in-chief, the learned judge refused to allow cross-examination of this witness by counsel. When the matter went up to the

Federal Court, one of the grounds of appeal was on the denial of the rights of counsel to cross-examine. The issue of when the credit of the witness ought to be assessed was never appealed nor properly argued. Inspite of those weaknesses and dearth of argument, Abdoolcader FJ still went on to comment on that point. Not stopping there, His Lordship without taking into account the mutual exclusivity of sub-ss. (a), (b), and (c) of s. 155, at p. 277 (para. B left) proceeded to say:

> ... but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence ...

I have already given my views with regard to this matter earlier, where I said that the sub-provisions (a), (b) and (c) of s. 155 were mutually exclusive, and therefore does not entertain the consideration of any other evidence, or for that matter "with the rest of the evidence", as suggested by Abdoolcader FJ where s. 155(c) was concerned. Please refer to the earlier pages, if necessary for clarification.

By virtue of the above enlightening definitions, and in the context of the specific substantive matter canvassed in *Dato Mokhtar Hashim*, apart from there being no lengthy legal argument on the other unconnected matters, but yet a stance taken, I therefore was satisfied that the view of Abdoolcader FJ was *obiter* in nature. I would not like to speculate on the outcome had the matter been properly argued by the contending parties before Abdoolcader FJ, but suffice if I opine that by virtue of the manner the opinion was formulated, which was in contradistinction to a *ratio decidendi*, I was thankfully given room to manoeuvre and thereafter circumvent his views.

Additional Basis Worthy Of Consideration

In a hypothetical case of a judge deciding on the credit of a witness, at the end of an impeachment exercise, certain advantages or positions may be created. In the event that challenged witness (for brevity I have resorted to the terminology of "challenged witness") is the nuclei of the prosecution's case, but impeached immediately, then in all probability the prosecution would withdraw the case or offer no further evidence against him. To delay until the very last of a long list of witnesses is completed surely would be an exercise in futility. Whether the determination is at the end of the impeachment proceeding or otherwise, the outcome would still be similar in that an acquittal would follow. The accused too would know what course of action to undertake if the very accuser or an important element of the prosecution's case has been eliminated, thus ensuring certainty and fairness to both the adversaries. A denial of the right of certainty, and not be subject to malicious prosecution, or be hounded by a groundless charge surely is an abrogation of the constitutional and substantive right of the accused.

Under s. 376 of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor, and shall have the control and direction of all criminal prosecutions and proceedings, be it in the form of their initiation or withdrawal (art. 145(3) of the Federal Constitution). The Court must never be a party in shackling those constitutional powers, but instead must work towards ensuring that the rights of an accused person is not being violated. An accused person in any criminal proceeding is very aware that his freedom is constantly being intimidated, and may be short-lived, and as such will only be too happy to see the back of that court as soon as possible. Therefore if a court decides promptly, and declare the two witnesses as impeached as in this case, either way both the parties will be grateful, with the Public Prosecutor being too happy to be rid of saboteurs of his case, whilst the accused being more than happy to see a weakened prosecution. A weakened prosecution can only improve his chances of an acquittal. If both parties are waiting with bated breath for an immediate ruling, bearing in mind that no inhibition is placed under s. 155 for that course of action, I see no reason to procrastinate and cause disaffection on all parties.

I find no justification as to why for a trial within a trial proceeding, interlocutory applications or any inquiry which require a prompt and immediate answer ought to be treated differently to impeachment proceedings, bearing in mind that they all have near similar characteristics. I cannot fathom the logic in wasting time and money when the outcome is predictable as examplified by that hypothetical case. Furthermore, as no defence counsel may be prevented in law from recalling a witness eg, the challenged witness, either for cross-examination or for some other good excuse under the relevant Code or Act, no hurdle may prevail to bar him from invoking that right as that witness is yet to be construed as impeached. If that challenged witness is recalled, thus possibly subverting the attempt to impeach him, surely the very purpose of s. 155(c) of the Evidence Act would be defeated (see commentaries of Datuk S. Augustine Paul in *Impeachment Proceedings* at pp. 69-73).

In neighbourhood Singapore, the Court of Criminal Appeal there made some rather interesting observations at p. 538 para. I in *Syed Abdul Aziz & Anor v. Public Prosecutor* [1993] 3 SLR 534, particularly 538, where the court through Rajendran J said:

> ... Although Taylor J in *Muthusamy v. PP* took great pains to set out the procedure for impeaching credit, he did not say that the court was obliged at the completion of the exercise to make a ruling whether the credit was impeached or not. *There can of course be cases* where a court confronted with a materially inconsistent previous statement made by a witness *is prepared at that stage to indicate that the witness is not worthy of credit* and that the evidence of that witness will be disregarded but that *does not mean that the court is obliged in every case* to make such an immediate ruling ... (emphasis supplied).

The impression given is that the courts there are not too stringent in their approach with regard to the issue at hand, and have permitted some leeway or room for courts to make an immediate ruling at the end of the impeachment exercise, if the need arises in certain cases.

On the basis of all the arguments supplied above, to use the words of Abdoolcader FJ, "the appropriate stage" after having carefully absorbed the distinguishing facets of the current case with all the previous authorities, I had no hesitation in holding that an immediate finding may be made at the conclusion of the impeachment proceeding. Furthermore, I found solace from the case of *Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121 Federal Court case mentioned earlier, where the highest court of the land had occasion to discuss the impeachment of the second appellant's credit, based on his previous cautioned statement. At the High Court level the presiding judge had made an immediate ruling without waiting for the close of the prosecution's case. Eventhough the Federal Court did criticise the relevant judge, for not ensuring the admissibility of the cautioned statement beforehand, conspicuously enough their Lordships made no disparaging comments on the immediacy of the ruling. It was the finding of their Lordships that inspite of that shortcoming, by virtue of the circumstances of the case, no injustice had occured. To regurgitate, that quorum had accepted the admissibility of the previous documents but within the perimeters of the ruling made immediately after the impeachment proceeding, thus inferring that the act of the High Court Judge had been endorsed. As Salleh Abbas FJ (as he then was) at p. 124 para. A (right) said:

> We see no merits in the attacks made on the finding of the learned Judge.

With regard to the view of this quorum, as opposed to the view of the quorum in *Dato Mokhtar Hashim* pertaining the exclusive quality of sub-s. (c) of s. 155 of the Evidence Act, the Federal Court here at p. 123 para. I, when adverting to the specific usage of the former statement, said:

> As regards contradicting ... its intention being to give the witness an opportunity of either explaining away the inconsistent part of the statement or correcting his evidence so as to remove the inconsistency. *If as a result of his explanation or correction, there is no more inconsistency, the matter ends there, otherwise the witness is liable to be contradicted.* (emphasis supplied)

Mercifully their Lordships there had hit the nail right on its head, when they interpreted this provision to apply only within the confines and ambit of this subsection, without spilling over to the other provisions of sub-ss. (a) and (b) of s. 155 or *vice versa*, in contradistinction to what Abdoolcader FJ had opined. Eventhough Abdoolcader J and Hashim Yeop Sani J were of similar standing, the view of the former was made respectable by himself subsequently

but from an elevated platform (It is worthwhile to note that Abdoolcader FJ had said "Abdoolcader J there took the correct approach" ... rather than uttering words like "The Federal Court or Abdoolcader J on behalf of the Federal Court etc." To put it crudely it was a very personal approach). By 1983 judges therefore in Malaysia had the choice of following either the decision of *Dato Mokhtar bin Hashim & Anor v. Public Prosecutor* or *Krishnan & Anor v. Public Prosecutor*, the latter being more neutral, better argued and more on point. On the basis of there being two Federal Court cases, each taking a separate route, I was therefore at liberty to be partisan to the views enunciated by *Krishnan & Anor v. Public Prosecutor*. Apart from all the above reasons which I had dissected earlier, I am of the view that an authority which has not seen the daylight of a good argument is not a good precedent and therefore is not a binding authority. That being so, it will be an exception to the rule of *stare decisis*. I refer to the case of *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329 where at p. 347 Augustine Paul JC said:

> It was said as long ago as 1661 that 'precedents *sub silentio* and without argument are of no moment' (see *R v. Warner* [1661] 1 Keb 66). In this regard *Precedents in English Law* by Cross and Harris (4th Ed) states at pp. 153-159:
>
> > It seems always to have been accepted that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to *stare decisis*, or for the reason that such proposition is not truly part of the ratio. The last 15 years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. In this light, decisions without argument must be viewed as a general exception to *stare decisis*.
>
> In *Baker v. R* [1975] AC 774, the Privy Council held that although inferior courts were bound by decisions of the Board even if they were *per incuriam*, they were not bound by propositions of law incorporated into the *ratio decidendi* which had merely been assumed to be correct without argument.

Further down at para. F the learned Judicial Commissioner said:

> In any event where the *rationes decidendi* of two decisions of a higher court of equal jurisdiction conflict with one another and the later decision does not purport to overrule the earlier, an inferior court may choose which *ratio decidendi* it will follow and in doing so it may act on its own opinion as to which is the more convincing ...

In the abovementioned case of *Baker v. The Queen,* Lord Diplock clearly said:

> To this general rule there is an obvious exception, *viz,* where the *rationes decidendi* of two decisions of the Board conflict with one another and the later decision does not purport to overrule the earlier. Here the Jamaican courts may choose which *ratio decidendi* they will follow and in doing so they may act on their own opinion as to which is the more convincing.

To wind up the matter at hand, suffice for me to comment that it was based on those considered grounds that I impeached the credit of PW15 and PW16 at the end of the impeachment proceedings, without waiting for the close of the prosecution's case. I thus had departed from the view of Abdoolcader FJ in consonant with the view held in *Krishnan & Anor v. Public Prosecutor*.

Tendering Of Statements Of Accounts Of OCBC And Luth And Documents From The Registrar Of Companies

In the course of the trial the learned Deputy Public Prosecutor proceeded to tender certain documents, particularly statements of accounts from Luth and OCBC, and documents from the registrar of companies reproduced either from microfilms or direct from computers. The impression given by counsels for the accused was that, no serious objection was held as against any tendering of documents which were printed direct from computers, but viewed differently those reproduced from microfilms created out of tapes emanating from computers. It is elementary that cases are decided on evidence which must be admissible in law, apart from being relevant to the issues. Section 3 of the Evidence Act 1950 reads that:

> "evidence" includes –
>
> (a) ...
>
> (b) all documents produced for the inspection of the court: such documents are called documentary evidence.

Under s. 61 of the Evidence Act, the contents of documents may be proved, either by primary or secondary evidence. It is the established rule that when documents are to be tendered, these relevant documents must be primary evidence, unless they come within the legislated exceptions (s. 64 of the Evidence Act). The exceptions are sufficiently provided for under s. 65, with the burden resting on the party that wishes to introduce the secondary evidence, ie, the existence of those special reasons, (s. 104 of the Evidence Act; *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1989] 3 MLJ 360). Mohamad Dzaiddin SCJ in *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 in crystal clear terms said:

> It is a well-established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s. 65 of the Evidence Act 1950.

Certainly it will be a laborious affair, and highly stressful for the interested party if it desires to tender secondary evidence, as the preconditions laid down in the Evidence Act are circuitous and stringent. As an example, a copy cannot be produced unless it is proved that the alleged copy is in fact a true copy of the original, or that the original had been misplaced (s. 63(b) and (c); see *Wong Choon Mei & Anor v. Dr Kuldeep Singh & Anor* [1985] 2 CLJ 126; [1985] 2 MLJ 373 and *Ameeroonissa Khatoon v. Abedoonissa Khatoon* [1874-75] 2 I.A. 87, 102). To avoid that stressful route an escape route has to be identified by the interested party.

To recapitulate, in general the above description would appear to be the brief established standard requirements prevailing in Malaysia, with regard to that specific aspect of law of evidence.

By virtue of technological advances, Malaysia responded accordingly, and new laws were drafted to meet these new challenges, in particular the admissibility of evidence stored or generated by computers. Had it not been for these spectacular legal responses, documents or statements produced by computer records would certainly fall under the rule against hearsay and therefore inadmissible in any court of law. Certainly counsels would be hard-pressed to overcome the best evidence rule too. The relevant legislation in question is the Evidence (Amendment) Act 1993 Act A851 which brought the law of evidence abreast with the "cyber progress" currently experienced by the country.

With the introduction of Act A851, amendments were made to the terminologies of "document" and "computer". By virtue of the amendments "documents" now read:

> any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of –
>
> (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;
>
> (b) any visual recording (whether of still or moving images);
>
> (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
>
> (c) a recording or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),

a or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

ILLUSTRATIONS

b A writing is a document.

Words printed, lithographed or photographed are documents.

A map, plan, graph or sketch is a document.

An inscription on wood, metal, stone or any other substance, material
c or thing is a document.

A drawing, painting, picture or caricature is a document.

A photograph or a negative is a document.

d A tape recording of a telephonic communication, including a recording of such communication transmitted over distance, is a document.

A photographic or other visual recording, including a recording of a photographic or other visual transmission over a distance, is a document.

A matter recorded, stored, processed, retrieved or produced by a
e computer is a document;

whilst "computer" reads:

"computer" means any device for recording, storing, processing, retrieving or producing any information, or other matter, or for
f performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer;

g The applicability of these amended terminologies become highly significant in the light of the new s. 90A of the Evidence Act which reads:

(1) In any criminal ... proceeding, a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the
h course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) ...

(3) ...

i (4) ...

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was –

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

To make sense out of these amendments, s. 62 of the principal act has also been upgraded, by the insertion of Explanation 3 which reads:

Explanation 3 – a document produced by a computer is primary evidence.

For purposes of the current case, over and above that of s. 90A of the Evidence Act which permits the introduction of computer documents, and strengthened by s. 90C which overrides the Banker's Books Act, the prequisites of s. 3, 4 and 5 of the Banker's Books (Evidence) Act 1949 had been complied with, as Bank Negara had given its requisite consent. This means the copies of the original books of the banks and their entries are now receivable at the trial, as *prima facie* evidence of the entries of related matters, transactions and accounts stated therein if any exist (see *Public Prosecutor v. Dato Kee Yong Wee & Ors* [1987] 2 CLJ 329; [1988] 2 MLJ 198). This permission by Bank Negara negatives the involvement of the High Court, as provided for under s. 6 of the Banker's Act, in the event there are objections by account holders. The all encompassing question left to be clarified by Legislators, is whether "computers" fall within the definition of "banker's books", a question worthy of consideration by Parliament and Courts. In any event, in the case of *Barker v. Wilson* [1980] 2 All ER 81, at p. 83 (para D) Caulfield J said that "the definition section does include microfilm ... As far as I can see (and indeed it is a matter of common sense) the microfilm is itself an entry which is

maintained by the bank in respect of a customer's account. ... But I have no doubt at all that actual microfilming of actual transactions and actual cheques do come within the definition of 'bankers' books' in s. 9". Bridge LJ further agreed that an entry in a banker's book include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm. Surely computers will fall within the ambit of this view by virtue of the scope being sufficiently wide enough to cater its inclusion. Bridge LJ thankfully had the foresight in that case to use the word "include", and hence this view.

Currently, by virtue of the tendering of the exhibits *via* s. 90A of the Evidence Act, the relevancy and obstacles of the Banker's Books (Evidence) Act 1949 have been side-stepped, as the effect of that Act has been whittled away by effluxion of time, and technological progress and recent legislations. Section 90A of the Evidence Act inserted by the Evidence (Amendment) Act 1993 (Act A851), is a provision which is rather revolutionary, in that, a document produced by a computer is admissible as evidence so long as the document was produced by the computer in the course of its ordinary use. On this issue I cannot improve on what was said by Mahadev Shankar JCA, in the case of *Gnanasegaran a/l Pararajasingam v. Public Prosecutor* [1997] 3 MLJ 1, at p. 14, when he said:

> We need to remind ourselves that s. 90A was enacted to bring the 'best evidence rule' up to date with the realities of the electronic age. Receipts for payments in and records of payments out of a bank account are keyed in by the tellers into the terminals at the counter, and the information is electronically stored in the bank's computer. The information so stored is not in itself visible to the naked eye. To become visible, the raw data has to be projected on a video display unit and/or printout. So the definition of a 'document' in s. 3 of the Act now provides that both the display on the video display unit and the printout qualify as documents. The last two items in the Illustrations to the section have spelt this out.
>
> The effect of s. 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer.
>
> This is a relaxation of the direct evidence rule in s. 60 of the Act beyond the extent to which its provisions have been diluted by s. 32(b) in the case of document made in the ordinary course of business. A situation could thus arise under s. 90A(1) where the particular person who keyed in the information may not be individually identifiable, but the document would nevertheless be admissible.

This provision therefore discards the necessity of the maker of that document to be the one to tender the document. The calling of the person who keyed-in the credited sum of RM500,000 for the accused and his wife, though unnecessary by virtue of the provisions of s. 90A, merely meant an easier passage for the prosecution (with the quality of the evidence remaining unaffected).

For purposes of this case and the unusual set of facts before me, additional to the previous thorny issues, there is another legal problem that require legal discussion. That legal problem is whether a document produced more than once removed from a computer is still primary evidence (see Explanation 3 of s. 62 of the Evidence Act); or even for that matter whether it is hearsay. Turning to the facts, a scrutinisation of the evidence will show that before the statements of accounts of the accused and his wife came into existence in the documented format prepared in Kuala Lumpur, the data initially emanated from the computers in Melaka, when the relevant sums were keyed-in there. The information or data was captured in Kuala Lumpur, as the local computer was on-line with the headquarter's host computer in Kuala Lumpur.

The Overseas Chinese Banking Corporation and the registrar of companies also had about the same system before printing and sending the statements of accounts to account holders, or to information seekers, in this case the Badan Pencegah Rasuah, whichever is applicable; though not as intricate as the Luth's trail. Fortunately due to the similarities of the system, I see no necessity in repeating the legal arguments regarding the relevant documents produced by the respective legal entities, tendered by the prosecution in the course of the hearing. The legal basis of my argument therefore will apply accordingly to documents produced by them either from microfilms or computers.

A cursory perusal of the evidence will show that the statements of accounts of the accused and his wife were tendered by PW53, ie, one Tuan Haji Mohd Zaini bin Mohd Jonid, who was the head of the Unit Rekod Dan Maklumat Pendeposit Luth in Kuala Lumpur. He confirmed that he was the person who printed the documents. PW56 reiterated that the captured data in the main frame computer in Kuala Lumpur, were eventually processed in the format of statements of accounts, and stored in tapes with the contents left undisturbed. These tapes were later sent to a private company called Computer Systems Adviser, for purposes of microfilming the contents. After the microfilms were returned and after six months had elapsed, Luth will print the statements of accounts of depositors, including the accounts of the accused and his wife, as contained in the microfilms. Before printing, reader printers were used for purposes of identifying the relevant information; and as in this case, after the accused and his wife's statements had been identified, were prints made out. As regard banks the statement of accounts were sent out on a monthly basis.

We now turn to the question of whether these bank printouts are admissible in law or otherwise. I begin with the stored data. The information for all intents and purposes, are data which do not require human interference. These modern contraptions merely take cognisance of the information and data supplied, and thereafter store them. That record which is stored certainly cannot be construed as hearsay as it is not a statement by a person. In the case of *The Statute of Liberty* [1968] 2 All ER 195 the headnotes clearly read in no uncertain terms that the records, made by purely mechanical means and without human intervention, by a radar set at a shore radar station, in respect of the echoes of two ships involved in a collision at sea, was in the nature of real evidence and was admissible in evidence.

As regards the resultant computation or balance reflected in the relevant statements of accounts, arrived at by the computer's calculation, the case of *R v. Harper and R v. Minors* [1989] Cr. App. R 102 takes prominence. The court there when discussing the relevant British laws, especially ss. 68 and 69 of the Police and Criminal Evidence Act 1984, opined that where a computer was used to perform functions of calculations no question of hearsay was involved. A dripping wet weight conscious person standing on an overused weighing machine, with the exact weight registered without any human interference, immediately comes to mind when deciphering this comment. Similarly in the case of *Stanley William Wood* [1983] 78 Cr. App. R 23, eventhough the printouts were held to be inadmissible under s. 1(1) of the Criminal Evidence Act 1965, nevertheless as the computer was used as a calculator, apart from being a tool and not contributive to its own knowledge, they were treated as a piece of real evidence, and hence admissible at common law (see also *Public Prosecutor v. Ang Soon Huat* [1991] 1 MLJ 1 where it was held that computer printouts were real evidence; also *R v. Ewing* [1983] 2 All ER 645 ruled that a computer printout was admissible under the same provision). Apart from those English cases, some assistance could also be derived from a Singapore case ie, *Aw Kew Lim & Ors v. Public Prosecutor* [1988] 1 CLJ 584; [1987] 2 MLJ 601 where the High Court there ventilated that, with special reference to the facts in question, the printout from that computer was not a copy or an extract from any document filed in the registry but an original document. Eventhough the document was rejected on grounds of hearsay, it was unmistakable that the court did recognise that documents coming from some kind of data base or memory bank of a computer are original documents. Had this case have the benefit of s. 90A of the Evidence Act, that document would have passed all the legal obstacles.

To wind up on the issue of hearsay, this matter did not beset me, as apart from the makers being called to give evidence, the information or data involved was also undisturbed by any human hands. The captured information

stored in Kuala Lumpur, which came about because of the on-line system, was created by the normal process of computerisation. Apart from that, there was abundant evidence to convince me that comparisons were made at every level, and no mistakes had been detected. This direct evidence also assisted in the prosecution circumventing s. 90A(2), when the witnesses admitted that the documents were produced in the course of ordinary use.

In the case of *Standard Chartered Bank v. Mukah* [1996] 3 MLJ 240, an Ian HC Chin J viewed that only if the evidence were challenged as to its admissibility was a certificate necessary, and even that only with regard to whether the documents were produced by a computer in the course of its ordinary use. In the current case the problems were anticipated by the prosecution and neutralised further by oral testimony.

The fact that the documents were produced by computers, even after the commencement of a criminal investigation or proceeding, is irrelevant by virtue of s. 90A(6). In fact this provision further clarifies that "any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use". The prosecution's case, therefore apart from being assisted by direct evidence is also blessed by legislators.

By a mode of linkages and legal versatility, I had no hesitation in admitting the statements of accounts of the accused, eventhough many times removed from the first produce of the initial computer.

The on-line system of the relevant institutions ensured the authenticity of the data as no information were tampered. At the risk of repeating the facts, as in the case of the Luth scenario, after the correct format had been keyed-in by a Luth officer (PW56), this information was stored in a tape, to be sent to Computer Systems Adviser when the time was right. The transfer of this information to the tape did not affect the admissibility and value of this piece of evidence, be it the tape or the contents, as under the new definition a tape is a document. Under Explanation 3 of s. 62 a document produced by a computer, in this case a tape, is primary evidence. From this tape a film is produced. Similarly, under the new definition of document, "film" comes within the ambit of "document" (the new definition "film" includes a microfilm and any negative, with "microfilm" to mean any transparent material bearing a visual image in reduced size, either singly or as a series and includes a microfiche). By virtue of the wide scope of "document", the prints that were made from the microfilms would therefore come within the boundries of "any matter expressed, described or however represented upon any substance, material, thing or article ...". In fact under the heading of Illustrations it is stated that "words printed, lithographed or photographed are documents." I

cannot imagine why figures printed, lithographed or photographed are not documents. At this stage, Explanation 2 of s. 62 of the Evidence Act comes into play, as eventhough the microfilms may just not be within the ambit of "computer", it definitely is within the ambit of "document". Explanation 2 in no uncertain term says, "where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest ..." The statements of accounts of the accused and his wife were made by one uniform process of printing and were of the originals. They were not copies of a common original or photostated copies of a printed copy. Therefore the printed copies of the statements of accounts of the accused, and his wife clearly came within the ambit of Explanation 2, which is evident in s. 62 of the Evidence Act.

By the same argument, the documents produced by the banks eg, Overseas Chinese Banking Corporation and the registrar of companies, tendered by the prosecution, were also primary evidence, and therefore admissible. To complete the write-up, eventhough the films, tapes or statements were produced after investigations had begun ie, after the Badan Pencegah Rasuah had come into the picture, that interceding factor is irrelevant by virtue of the following reasons. The provision of s. 90A makes any document ... or a statement admissible ... of any fact stated therein ... But what is that fact stated therein? The answer undoubtedly is the figure of RM250,000 or whatever is printed in that document. The truth of those "facts therein" whether the sums had been credited, deleted, withdrawn, put in by error or whatever is another matter. That has to be clarified by other evidence, ie, by other admissible evidence. In the current case, those "facts therein" were keyed-in way back before any investigation or criminal proceedings were initiated, thus requiring the invocation of the deeming provision unnecessary.

Tendering Of Documents

The issue of who should the person be to tender the seized documents, became a bone of contention several times during the trial, in the light of the several seizures made by the Badan Pencegah Rasuah officers in the course of their investigations. By virtue of the seizures, the documents were left in the custody of the Badan Pencegah Rasuah officers, and therefore physically separated from the makers or owners of the documents. Pursuant to that predicament, a decision had to be made whether the documents should be tendered by the person last in custody or the makers/owners who did not have possession of them.

The other set of evidence, ie, those not seized by the Badan Pencegah Rasuah officers, but brought to court by the makers themselves or relevant responsible officers posed no problems. As the makers themselves continuously had the full custody and control of the documents and evidence, and having identified

the documents, no consternation arose. I accordingly had those documents marked as exhibits. It is the first situation that I am interested in discussing under this heading. It must be emphasised that even if I had allowed the documents to be tendered and marked as exhibits, it does not mean that those documents had become admissible by virtue of my judicial act, if at the very outset they were inadmissible. It is axiomatic that the strict requirements in a criminal case cannot be relaxed to breach any material gap (see *Sia Soon Suan v. Public Prosecutor* [1966] 1 MLJ 117). It cannot be stressed too vehemently that, it is the bounden duty of the party wishing to tender those documents, be it the prosecution or the defence to ensure that those documents are tendered properly. Shankar J in *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377, at p. 381, succinctly said this:

> In the first place it is the duty of counsel engaged in a case to see that the documentary evidence upon which he relies is properly tendered in court and proved. After they have been proved he should also see that when admitted into evidence the documents are properly marked as required by law. Reference may be made in this connection to *Immam-Ud-Din v. Sri Ram Perbhu Dial.*

See also the cases of *Tsia Development Enterprise Sdn Bhd v. Awang Dewa* [1984] 1 MLJ 301 and *Foo Gee Yaw v. Low Koo Biow* [1996] 5 MLJ 7.

The Evidence Act is applicable to the present judicial proceeding before me (s. 2). As promulgated under Part III Chapter VII, and further required by law, it is encumbent upon the prosecution to prove its case at every stage of the way. The prosecution in relation to a piece of evidence must not only prove its admissibility, but must ensure that all the other established legal and procedural requirements are stringently adhered to. Anything less will incur the wrath of the law. When disseminating the processes of tendering those documents as exhibits, a procedural requirement that cannot be ignored, will be the factor of "chain of evidence" (*Au King Chor & Ors v. Public Prosecutor* [1985] 1 CLJ 122; [1985] 1 MLJ 216; *Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345; [1992] 1 MLJ 322). This factor cannot be taken lightly, as, in the event a break in the chain of evidence occurs, some doubts as to the identity or original physical state of the relevant evidence may surface. Needless to say too, if there is some doubt as to the authenticity of that exhibit, that doubt must be conferred on the accused for his benefit. In the case of *Sun Kam Heng v. Public Prosecutor* [1993] 1 CLJ 109; [1992] 2 MLJ 826, the arresting officer there had snatched a firearm from the appellant. Unfortunately no one had the good frame of mind to endorse or give any particular identifying marking for the gun, inspite of the known fact that that firearm had no serial number. The officer who kept that weapon in his safe was neither called nor even offered by the prosecution to the defence, although available. Edgar Joseph Jr SCJ at p. 831 in terse terms said:

> It goes without saying that the burden was upon the prosecution from beginning to end and from first to last to prove beyond a reasonable doubt that the subject matter of the charges, being the revolver (P3) with the ammunition in it (P9B), which had been produced in the court below was the very thing described as a revolver, which had been snatched from the hand of the appellant on the date and at the time and place mentioned in the charges.
>
> ...
>
> If therefore, there was a break in the chain of evidence relating to the retention of what was described as a revolver, which had been snatched from the hand of the appellant, at any time before it was allegedly sent to the armourer; in particular, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom, then the testimony of the armourer and the report of the chemist would have to be disregarded as being irrelevant to the charges.

Therefore it cannot be denied that the identity of an exhibit is important. For comparison purposes, I refer to three cases where the identification of the exhibits posed no problems to the court, due to the sufficiency of evidence already produced. In *Chong Ah Chai & Ors v. Public Prosecutor* [1979] 2 MLJ 262 eventhough the matter of the charge was not produced, but sufficiently identified especially by photographs, the court opined that there was no material gap in the chain of evidence regarding its identity. Again in *Teoh Hoe Chye v. Public Prosecutor* [1987] 1 MLJ 220, the court retained the same view, in that it was unnecessary to call additional evidence when there was no doubt as to the identity of the exhibit. Otherwise it would have been fatal (see also *Pavone v. Public Prosecutor (No. 2)* [1986] 1 MLJ 423).

Having scrutinised all the relevant statutory laws, I loath to admit that I found no provision anywhere which has tabulated the manner of tendering exhibits, be it by the prosecution or the accused. I was satisfied, after considering all the above authorities that, so long as there was no break in the chain of evidence as regards the documents seized, and subsequently identified by the makers to be the very documents made by them, or identified as the documents taken from the owners, the provision of the Evidence Act had been adhered to. If it were proved that the documents had remained in their original state up to the day they were presented in court, I saw no reason why the documents should not be tendered as exhibits through the seizing officers. One must bear in mind that the officers who seized those exhibits would be the last persons to have custody of those items and would be able to rebut any allegations of impropriety over those documents. There is no presumption in law that Badan Pencegah Rasuah officers are unworthy of trust. Moreover under 114(e) of the Evidence Act, the court may presume that the official acts of those officers had been performed regularly. To reiterate, as the exhibits had been sufficiently identified by the makers and had admitted in court that

they had not been tampered with, and had remained in their original state, with the seizing officers confirming that they had complete custody of the exhibits to the very last day, I detect no legal reasons to prevent the relevant Badan Pencegah Rasuah officers from tendering the exhibits.

Finding At End Of Prosecution's Case

The above was the scenario when the case reached the end of the prosecution's stage. Having considered the totality of the evidence, though circumstantial in nature, but overwhelming in amount, convinced me that the prosecution had proven its case beyond reasonable doubt as against all the three charges. Pursuant to that finding I therefore called the defence.

Defence Stage

At the very outset of the defence stage, the accused worked towards adducing evidence proving that he was bogged down with multifaceted functions and duties, by virtue of being an Adun and a member of the EXCO. His responsibilities and duties intertwined, the very nature of which required him to interact with his constituents. They came by the droves to consult him, inexorably expecting all sorts of assistance and favours that were within his means. He never denied these people access to him, be it night or day. In the course of that predicament, he prepared "Congratulatory", "Hari Raya" and "Thank You" cards. He even had them pre-signed. Whenever a necessity arose to communicate with specific persons, their names and the relevant messages were handwritten on those cards. If those cards did not have the names of the recipients, then he would be unable to comment on them, hence his inability to throw any light on how and why P24A, a Thank You card, found its way into a Land Office file (P80).

The busy schedule, which saw him interacting with the rakyat, resulted in him being even involved with their personal lives. In the wake of assisting them, *inter alia*, buying over Ivory Heights, he got into trouble. It was also in the course of this interaction that assistance-seekers were supposed to have carelessly left behind important items in his house. For purposes of this case, a green file and a defective company stamp owned by Ivory Heights, were among the items. This latter company was no stranger to him as in the thick of things he had advanced assistance either in the form of money or kind. While rendering those services, he was introduced to people like Mustadza, Rohana, Shamsiah etc. Indisputably, it was his intention to convince the court that all those documents and witnesses, supposedly connected in a nefarious manner to him, as the prosecution wanted the court to believe, were not what they seemed to be.

Much court time was taken up in the examination of P112-P117, the very minutes of the EXCO meetings. The accused, although did admit not being the maker attempted to prove that these exhibits in its original form came in loose forms and enclosed in pink files. They did not come in bound forms as adduced. I did not find this time consuming session successful in persuading me that P112-P117 were inadmissible evidence.

As regards the issue of whether the accused declared his interest in Ivory Heights, or whether he left the meeting room at the crucial moment, much court's time was wasted due to the manner he conducted his case. The accused began by evincing that it was quite normal for participants to leave the room on some pretext, eg, to go to the wash room, smoke, respond to urgent telephone calls, etc. To rely totally on the minute books which were silent as to the recording of such normal activities of leaving in the midst of such meetings, was unacceptable. They did not give an accurate depiction of the situation. As regards this issue of declaring one's interest, the accused confirmed that previously whenever a particular agenda was to be discussed, any interested party would invariably declare his position and thereafter leave the room. Mat Sor (PW37), in clear terms had also testified that such declarations, followed by the act of leaving the room, would inevitably be minuted by him. As it were, the minute books were silent as to both acts of the accused. For a few days the accused gave the impression that he was seriously making an issue out of these two relevant factors. In an abrupt manner the court was caught off guard when he suddenly admitted that he never left the room or even declared his interest when the relevant agenda were being discussed. By taking this course of action, the accused had diluted the onerous duty of the prosecution. The admission strengthened parts of the relevant ingredient rather than rebutting that relevant portion of the prosecution's case when the defence was called. Conversely the accused approached that admission as negativing any inference that he had an interest in the company or its activities.

The accused ventilated that the transparency of all his transactions, which could easily be traced back to him, must surely neutralise any suggestion that his dealings were corrupt and criminal in nature. He pressed home that had he been corrupt, he would have taken steps to cover his tracks, thus denying the Badan Pencegah Rasuah the chance of nailing him. The technique of the accused attempting to rebut the prosecution's case by confronting them headlong, certainly was interesting to say the least. To ensure consistency with his version, he never attempted to disassociate himself with the evidence of PW15 and PW16, both impeached during the prosecution's stage, or the testimony of most of the prosecution's witnesses eg, Mustadza, Rohana, Othman Kassim etc. In fact he categorically admitted assisting Md Yusop on matters relating to Ivory Heights. He only parted company with the prosecution's case when he hotly denied ownership of Ivory Heights.

The association with Othman Kassim was also given sufficient attention when the accused stated that their relationship was more business related. In fact, his defence principally revolved around this figure with whom he had one transaction ie, the supposed purchase of lots 2253 and 2482. As the facts surrounding these two lots had a story of their own, the accused found it necessary to explain them. He testified that sometime in 1993 and 1994, he acquired two pieces of land, namely lots 2253 and 2482 respectively, with the latter bought from a Chinese man called Choo Sook Pin. He clarified that his entry onto lot 2482 preceded the date mentioned in the relevant sale and purchase agreement. There was a special reason for this. He unfolded that the vendor, being a gambler and a heavy drinker, had habitually borrowed money from him, and eventually accumulated a debt of approximately RM6,000. To settle this debt, this person had offered him lot 2482, a piece of land which covered an area of six acres, for sale. This lot then was still under mortgage, as it was charged to a financial institution, for a loan taken earlier by the vendor. A deal was struck whereby the purchase price was agreed at RM85,000. The accused took up a loan of RM55,000 from Bank Pertanian to cover a substantial portion of the purchase price, with the balance coughed out from his savings. After having taken care of all the necessary deductions, the vendor was left with the reduced sum of RM58,838.60 from the total purchase price. The necessary deductions were the retention sum of RM20,161.40, meant to meet the release of the charge from MBF Finance Berhad, and RM6,000 for the accumulated personal debts.

Having completed the above evidence, the accused related the scenario which saw Othman Kassim offering to purchase from the accused lots 2253 and 2482, cumulatively about 11.75 acres. After some brief negotiation for the lots, the purchase price was agreed at RM57,400 per acre, totalling RM675,000. He received the first payment of RM67,500 as deposit, for which he issued a receipt. Much to the chagrin of the accused, I did not permit the tendering of this supposed receipt as it was a photostated copy. The accused failed to convince me satisfactorily why the original was not produced (*Lee Kok Nam v. PP* [1999] 5 CLJ 283). On 2 June 1995 further payments were received when two cheques which grossed RM500,000 were handed to him by Luwe Sang Kau on behalf of Othman Kassim. These were the very cheques that were traceable all the way to Messrs. S.K. Khoo's premises. Returning to the pertinent facts of the sale of these two lots, by 2 June 1995 together with the alleged 10% deposit, he would have received RM567,500. The balance amounting to RM107,500, was to be paid on or before 1 June 1997 meant to defray the real property gains tax.

As far as the accused was concerned, the salient facts of the paragraph immediately above was corroborated by the relevant sale and purchase agreement (D193). The necessity of having D193 tendered became more urgent to him as it explained why the date of 2 June 1995 was chosen. This was so as by 2 June 1995, RM567,500 had already been received, but without any receipts being issued for the two additional payments made by cheques. Both parties had agreed that apart from appreciating the legal necessity of the sale and purchase agreement, such document could also double up as a receipt. Why the sale and purchase agreement was formulated in such a way, or why it was stamped on 8 November 1996 more than a year later, was of no concern to him. To him, that was the responsibility of the buyer, and as such no aspersion should be cast on him.

The accused consistently alleged that Ivory Heights was never his property but Md Yusop's. He admitted advising and assisting in its purchase, filling up P4A and a few other related matters. When I called the defence, it was on the premise that Ivory Heights was *defacto* owned by the accused. Even if I were persuaded that the owner of Ivory Heights was Md Yusop, I was hard pressed to locate the reason why Md Yusop relinquished, and handed over his position as a director to Othman Kassim on a silver platter without any compensation. The earlier evidence adduced during the prosecution's stage clearly showed that Othman Kassim was oblivious of the existence of that company prior to the signing of P45 (Form 48A), near Jaya Jusco. He received a telephone call from the accused, and in a twinkle of an eye inherited a land based company, without lifting a finger. How fortuitous! Of course, in the process Md Yusop and Jailani received nothing except possible jail sentences.

When Md Yusop received the offer letter from the Land Office, which required him to pay a premium of RM284,699 (P80AB), the accused admitted having advised him to take up one of these options, namely:

1. pay up if he has any money;
2. reject the offer, which meant that the lands would revert to the State; or
3. to enter a joint venture project with another person.

The facts attested that he rejected all three courses of action. As regards the first advice, this was an impossibility as he was penniless. Any person, let alone an experienced Adun-cum-EXCO member would know that the process of applying for a piece of land, not only was a continuous process but would entail enormous expenses. The accused must have known that if Md Yusop were to be successful in his applications, a substantial premium would be expected of him. It therefore would be highly improbable that the accused never advised Md Yusop of this financially burdensome point ie, if he were

the latter's adviser. Had he been informed, in all probability those applications would have been abandoned. On that score, as he pursued the matter inspite of having been informed of the potential expenses, the beneficial applicant in all reasonableness must be the accused. This is so as he was about the only person who could resolve the premium factor. If Md Yusop were to be believed as being the owner, then he must stand out as a person who had acted in the most unreasonable and unentrepreneurial-like manner.

Md Yusop, as the facts showed, did not reject the offer nor did he take the course of pursuing a joint venture project with some other person, but instead pursued a bizarre act. He relinquished his position and had all his dreams of inheriting untold riches dashed, when for some unexplained reason, had himself replaced by Othman Kassim, a person who appeared out of nowhere. Any sensible person would have been appalled by this action had it not been for the only reasonable explanation available, in that he was only a minion of the accused. Even, if Md Yusop were the actual owner of Ivory Heights, and desperately in need of funds to pay the premium, he could easily have embarked on a joint venture with others, and in the process synergising with his company. For that matter he could easily have just absorbed another gullible director, rich and willing to pick up the tabs. Tay Kim Pong, who fits that description could have been conscripted into that company either as a partner or director, thus making it unnecessary to have that company disposed. Instead of pursuing this simple and logical route, and after having endured all the excruciating hardship, Md Yusop without batting an eye surrendered his birthright to fame and riches. In the final analysis, I could not but conclude that the slavish assistance of Md Yusop was incidental in the acquisition of this company. Othman Kassim was roped in, among others, for his expertise and contacts with the outside world. True to expectation, with the assistance of his friend, one Luwe Sang Kau, Tay Kim Pong was shortlisted as the buyer. This scheme culminated in the accused being enriched by RM½ million.

One must bear in mind that at that opportune moment when Othman Kassim joined the company, it was already land based and healthy. It was therefore more than unusual, to say the least, that these two pieces of land owned by Ivory Heights capable of fetching a price of over RM2 million in the open market in the foreseeable future, would be sold by him merely for purpose of obtaining funds to purchase lots 2253 and 2482. These lots then had absolutely no commercial value. One must bear in mind that the evidence adduced at the prosecution's stage established that the forced sale value of lot 2482 was only RM55,000, coincidentally the same amount of loan given to the accused. In a nutshell, to pay so large a sum of money, for a lot valued at about RM55,000 in the open market, from funds obtained from the deliberate sale of another set of properties which had large potentials, surely was an act which went against basic business acumen.

Even if Othman Kassim were more interested in making a quick buck, and disposing the company in that speedy manner was one of the ways to attain that objective, one could not detract from the fact that Md Yusop and Jaini were never rewarded after the company was sold off. This was borne out by the fact that, after the sale and purchase agreement had been signed at the premises of Messrs S.K. Khoo, monies were handed over to Othman Kassim. Arithmetically, minus RM284,699 for the premium, RM200,000 deposited into Othman Kassim's personal account in Chung Khiaw Bank, RM37,671 which disappeared into his personal account in OCBC, RM500,000 paid to the accused, there was thus nothing left from the abovementioned sum of RM1.02 million to be given to anyone.

Everything was relatively quiet until 18 October 1996 when the Badan Pencegah Rasuah made its ominous entrance. From that day onwards a flurry of activities connected to the lots 2253 and 2482 transaction became obvious. The sale and purchase agreement (D193) connected to this transaction was activated and formally executed. I am satisfied that D193 was manufactured hurriedly, as seen by the poor quality of the contents of this document, and the other factors surrounding it. The rentless emphasis placed on the lots 2253 and 2482 transaction, which acted like a magnet in the defence of the accused, meant to draw my attention away from the involvement of the accused in Ivory Heights, never stood any chance of succeeding due to the intrinsic flaws found in both the transactions.

No self respecting solicitor would carry out his duties in a deal as reflected in D193, in such a shoddy and unprofessional manner, with a person of the accused's stature. No amount of juggling with bare words, or the highlighting of the contents could deny that this document had departed from the usual format of a sale and purchase agreement, in that:

a. perusing Part 9 of the 1st Schedule, the purchaser's solicitor was supposed to be M/s Bell & Lee, yet at the formal execution stage, it was totally unrepresented;

b. eventhough the accused admitted signing D193 before witnesses, he was unable to divulge the identity of the signatory, as the latter did not sign before him. Ironically, inspite of the accused's dependency over this document, it was a cause for concern for him, as he was unable to confirm that it was the copy retrieved from him;

c. the documented date of 2 June 1995, for the supposed sale of the relevant lots was after the oral agreement;

d. the commencement date of this agreement was not provided for anywhere in the 1st Schedule;

e. the solicitor's name, firm or seal do not appear at the relevant places eventhough a solicitor's firm had been nominated by the purchaser;

f. the names of the parties are absent below their respective signatures (as compared to P127); and

g. the stamping which took place on 8 November 1996, about one year five months and six days after the documented commencement date, attracted a penalty of RM25. This date is about 51 days after the Badan Pencegah Rasuah's officers began their investigation. The investigation started on 17 September 1996. On 18 October 1996 the Badan Pencegah Rasuah raided the accused's house and seized the green file and the defective company's stamp. How could it not create an impression that had it not been for the investigation, D193 would not have been activated? To counter this impression, the accused in his re-examination asserted that the sale and purchase agreement was handed over the next day after a request was made by Encik Mudasir. That request was made on 28 December 1996. This agreement by then had been stamped (8 November 1996). The immediate response, in itself, as ventilated by the accused would neutralise the inference that D193 was a fabricated document. I was not impressed by this submission.

Other Factors

In the course of the examination-in-chief, in consonant with his denial of ownership of Ivory Heights, the accused also made every effort to explain away certain odd acts and events. I waited in vain to be persuaded. For reasons known only to him, no independent evidence was produced to corroborate his testimony as regards the evidence under this heading. Ingeniously, he adverted substantially to the evidence adduced by the prosecution for support. To ensure brevity but without sacrificing the interest of the accused, I will only allude to a cross-section of the salient parts. Additional to this methodology, it is more than mere coincidence if the prognosis of the specific evidence follows the same path undertaken by the prosecution at the submission stage. This is so as this beaten path not only is sensible but also illuminating. I now elucidate these "other factors":

(i) PW8 (Shamsiah), who worked with Coopers & Lybrand, said that the accused was the person who bought Ivory Heights. Having purchased that company on his behalf, an unidentified Malay man came over to the office, and handed a cheque worth RM2,300 to her. The accused maintained that he informed her of Md Yusop's anxiety in setting up a company, with everything asked and done by him sheerly for the former's benefit. In fact, as gauged from the testimony of the accused,

he had a long conversation with PW8 regarding this matter. Inspite of this alleged clarification and reference to Md Yusop, she never mentioned the latter's name. She was never even cross-examined as regards this matter. Inspite of this failure to cross-examine the evidence of PW8, in particular on the issue of ownership, I still assessed the evidence before me in depth. Failure on the part of the accused to cross-examine on a particular point will not cure the prosecution's ineptness to prove its case beyond reasonable doubt (*Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212; *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 MLJ 209). Having assessed the totality of P8's evidence, I am satisfied that her evidence regarding the ownership of the company remains unblemished.

(ii) PW9 (Mustadza b. Abu Bakar), of Mustadza & Associates, evinced that the accused came to his office with instructions to purchase Ivory Heights, and to have Md Yusop and Jaini appointed as the two new directors. The names were supplied by the accused personally. The accused on the other hand testified that Mustadza was informed by him that whatever was done was for Md Yusop's benefit. Strangely enough Mustadza never dealt with Md Yusop or Jaini nor did he know them. Stranger still, Mustadza received documentations regarding the details of Ivory Heights which were kept in a green file from the accused personally, someone supposedly not beneficially interested with the company. Considering the facts of the case, and bearing in mind the prominent position of the accused in Melaka, it was rather demeaning to say the least for the accused, to be the constant running boy of Md Yusop. If the latter were the real owner, all these minor matters could have been resolved by Md Yusop without much effort. Eventhough the accused did not cross-examine Mustadza on these points, again I considered the evidence in totality. In conclusion I am satisfied beyond reasonable doubt that PW9's evidence regarding this matter remained unbesmirched.

(iii) As regards the thank you card (P24A), which found its way into a Land Office file (P80), the accused declared that he was unable to comment on it as it had no named recipient. Again this simple answer did not clear away the questions which nagged my mind, *inter alia*, as to why a card signed by the accused, owned by the accused and beyond the access of the general public, landed in the Land Office. A million to one chance occurrence materialised when this very card was found snuggled in the very file connected to Ivory Heights' applications. This issue merely piles up the evidence that pointed to the accused's extraordinary interest in this company, and matters related to it.

(iv) PW17 (Ismail Abu Hassan), the former director of the Fisheries Department of Melaka, asserted that Ivory Heights' application for the relevant lands, meant for a particular project was objected to at the initial stage. After receiving a telephone call from PW19 (Amran b. Yusof), who in brief requested him to reconsider the applications, on the premise that they were made by the accused, subsequently withdrew the objection. This telephone call, and the contents of the conversation, were confirmed by PW19. The accused on the other hand denied the contents of the conversation although admitted asking PW19 for help, supposedly for one of his constituents. At that juncture all the relevant parties would have known of the respective recommendations of PW17 and PW19. I was therefore beset by the question as to why the accused needed PW19's help, when the latter's Department had absolutely no objection to the applications. There was also no valid reason why PW19, or for that matter PW17, should fabricate a story that was against the accused's interest. What could not be denied was that, had it not been for the telephone call of the accused to PW19, with or without specific instructions, Ismail's stance would have remained unchanged.

(v) P4A, the application form for the Bacang land, involved merely the filling of addresses and other information privy to any applicant. It was a question of simple form filling job. There was nothing difficult about this. If Md Yusop was really the owner of Ivory Heights, there was no necessity for the accused to be involved in this clerical job.

(vi) The postal address of Ivory Heights was 23, Jalan Laksamana Cheng Ho, Air Leleh, Melaka which housed the office of Syarikat Usahajaya Sdn. Bhd., a company owned by one Hj. Saat Abu who was a very close friend of the accused. Md Yusop lived in Alor Gajah. The fact that the address of Ivory Heights was not in Alor Gajah, and that there was close kinship between the above address and the accused, again did not escape my attention. This additional evidence of course merely adds up to the already substantial evidence adduced pointing to the accused's ownership of Ivory Heights. No acceptable explanation was given by the accused on this issue.

(vii) At the premises of Jaya Jusco, Othman Kassim signed P45 (Form 48A). It was handed to him by PW12 (Norzaidi b. Mohd). PW12 who was the accused's driver, testified that he carried out this chore on the instruction of the accused. After retrieving P45, he thereafter returned it to the accused. Othman Kassim admitted that fact of having returned P45 to PW12. Again I was perturbed by the fact that if Md Yusop was present in this episode, why then did he not take custody of that

document, on the premise he being the owner of the company? Why the necessity for it to be handed over to the accused and then ceremoniously returned to him? A similar chain of event was repeated when PW12 retrieved the document at PW9's office. Surely this was a meandering and illogical process?

(viii) I have left it to the tail end the discourse of whether the accused had sufficiently rebutted the prosecution's view that the price paid by Othman Kassim for lots 2253 and 2482 was ridiculously steep and unreasonable, in the circumstances of the case. The accused, in the course of his examination-in-chief, attempted to justify that price by stating, *inter alia,* that:

a. the two lots had been upgraded. He explained that he had already expanded a substantial sum of money and time on them, especially in the like of planting expensive seeds, developing intricate water systems, ensuring permanent electrical facilities, etc. This was made short shrift of by the prosecution when the supposed expenditure in the upgrading were minutely scrutinised. No bills or other documentary evidence were submitted by the accused to support his assertion. Eventhough photographs were submitted to show the existence of improvement over the land, one must bear in mind that the lots were supposed to have been sold sometime between 1994-1995. The photographs were taken in mid March 1999, years after the oral agreement had been reached. The upgrading and improvement as seen from the photographs could have taken place recently and undertaken by Othman Kassim himself. Questions were never posed to him pertaining to these matters. The attempts and explanation offered by the accused therefore was unconvincing and uncorroborated. Even if the lots had been upgraded during the short period the accused possessed them, there was absolutely no cogent evidence adduced by him to justify the steep sale price in the circumstance;

b. the fact that Othman Kassim was extremely keen to buy those lots, even to the extent of being ridiculous, merely made his life easier. As I had rejected the lots 2253 and 2482 transaction as not being genuine, this factor therefore is also rejected;

c. the successful conversion of lot 2253 to Malacca Customary Land later, meant that the exorbitant price paid by Othman Kassim was vindicated, as the land could now remain with him in perpetuity. The variable of lot 2253 having a remaining lease of only a few years on the date of the transaction, should be viewed positively

rather than the opposite, as now Othman Kassim had a reason for the conversion application. No evidence on the other hand was adduced to prove that a successful conversion will inflate the value of the relevant lot ten times over; and

d. the supposed development around the Durian Tunggal area proved its potential especially in the field of agro-tourism. Even if there really was development in the vicinity, no tangible evidence was adduced by the accused to justify the spiralling price. Together with the factor of having rejected the lots 2253 and 2482 transaction, whatever expansion is being observed in that locality will be irrelevant, in so far as the charges were concerned.

(ix) The accused had high expectations of legitimising the lots 2253 and 2482 transaction by the tendering of D204. This document is a cheque dated 31 May 1997 worth RM107,500, supposedly for the last payment of the lots 2253 and 2482 transaction. Unfortunately the drama of this last payment merely unfolded the chinks in the accused's case, portraying him as a drowning person desperately clutching at every straw, and in the process dragging his fate into negative territory. Let us now peruse the facts.

In the event the sale and purchase agreement (D193) were genuine, bearing in mind that Messrs. Bell & Lee was documented as the purchaser's solicitor, then a prominent role would be expected of it. As it were, none of the solicitors from that firm were identified nor any documents produced by the accused to show that their services had actually been utilised. In the light of the accused desiring the court to believe that every condition laid down in D193 had been complied with fully, the twist pertaining to the usage of the services of other solicitors became more unexpected and pronounced. The accused in fact had always asserted that he was totally unconcerned about legal matters. He left matters of that nature to the purchaser. At the prosecution stage, Othman Kassim at p. 694 of the notes of proceedings in no uncertain terms had said that the last payment was made by his wife through a solicitor. DW4 who was a senior bank officer in Public Bank Berhad, confirmed that the buyer of that banker's cheque (D204) was Mr. Tan Lip Yip, a solicitor in Melaka. This witness further evinced that the solicitor's account had been debited. Mr. Michael Tan as he is popularly known, of Messrs. Tan Lip Yip, is no stranger to the legal and judicial fraternity here. The entry of this person was an unusual development as at no stage of the proceedings was his name ever mentioned by any of the prosecution witnesses, or for that matter the accused. Inspite of that dearth of evidence, his name mysteriously pops up and suddenly plays a major role in the payment of RM107,500 to the accused.

After perusing the notes of evidence and after having considered the testimony of all the witnesses, the irresistible conclusion is that Mr Tan Lip Yip, not only was not Othman Kassim's solicitor but was involved with D204. His contribution militates against the contents of D193 as regards the purchaser's choice of the services of a legal firm. The pertinent consequential question that will require answering will be, why was that cheque not bought by Messrs. Bell & Lee? Entity-wise there is no legal nexus between Messrs. Tan Lip Yip and Messrs. Bell & Lee. Whether this financial assistance provided for by Mr. Tan Lip Yip, for the benefit of the accused or his client, whoever that person is, may perhaps have contravened the Legal Profession Act 1976 (Act 166) is not relevent at this juncture. Many questions were left unanswered when this solicitor was never called to explain the cheque or his involvement with it. Inspite of that, as the amount in the cheque tallies with the balance, the inference must be that D204 is the last payment. As to whether actual payment was made, DW3, a bank officer from Public Bank Berhad, testified that only an officer from Bank Islam, into which bank the cheque was credited, could assist. Unfortunately, as the accused again failed to subpoena an officer from that bank, the question remained unanswered. This failure has unwittingly again cast a dark shadow over the accused's ability to rebut the prosecution's case.

This whole episode surrounding D204 leaves a rather poor taste in my mouth as the facts and events connected to it are riddled with suspicion and negativity. A thorough appreciation of this document together with the oral evidence, particularly elicited from PW52, DW3 and DW4, convinced me that this cheque is but a manufactured one, created in the hope of hoodwinking the Badan Pencegah Rasuah officers. In an indirect manner, the involvement of Mr. Tan Lip Yip who is totally alien to Messrs Bell & Lee, also confirmed my earlier finding that D193 was a concocted document. The non-involvement of Messrs. Bell & Lee in any of the events, let alone important ones, surely must mean that they had absolutely no idea that the firm's name had been used without permission.

Conclusion

In the final analysis, with the substantive defence eliminated due to their defects, the accused's position was really hopeless. His testimony depended totally on mere postulations and unsupported assertions. None of the pertinent parts were corroborated by documentary or oral evidence. To make matters worse for him, the prosecution's witnesses have remained unimpeached, apart from Md Yusop and Jaini, thus leaving their evidence unaffected. The total effect of this finding is that the prosecution's case has remained unrebutted.

With the proliferation of evidence before me, I have no other alternative but to declare that the prosecution has proven all the three charges against Datuk Hj. Sahar Arpan beyond reasonable doubt, and thus find him guilty. I therefore convict him on all the three charges.

Terjemahan

Secara ringkas, setelah dikaji dengan mendalam semua keterangan yang telah dikemukakan oleh orang kena tuduh, dan setelah mengkaji semula kes ini secara keseluruhannya, saya berpuas hati bahawa beliau telah tidak berjaya menangkis kes pendakwaan di peringkat pembelaan. Dengan ini saya berpuas hati bahawa pihak pendakwa tanpa ragu-ragu, telah berjaya membuktikan ketiga-tiga pertuduhan terhadap orang kena tuduh, melampaui keraguan yang munasabah. Oleh itu, saya mendapati Datuk Hj. Sahar Arpan bersalah ke atas ketiga-tiga pertuduhan yang telah dikemukakan oleh Pendakwa Raya dan dengan ini mensabit orang kena tuduh ke atas kesemua pertuduhan itu.

Tarikh: 19 April 1999

Masa selesai membaca keputusan: 10.57am.

Hukuman

12.17pm.

Setelah mengambilkira hujahan pihak pendakwa berkaitan hukuman, termasuk faktor-faktor peringanan yang telah dikemukakan oleh En. Jagjit bagi pihak orang kena tuduh, saya dengan ini menjatuhkan hukuman-hukuman seperti berikut:

1. bagi pertuduhan pertama saya jatuhkan hukuman penjara selama dua tahun dan RM20,000 denda, dan jika tidak dibayar, dipenjarakan selama enam bulan;

2. bagi pertuduhan kedua saya jatuhkan hukuman penjara selama dua tahun dan RM20,000 denda, dan jika tidak dibayar dipenjarakan selama enam bulan; dan

3. bagi pertuduhan ketiga saya jatuhkan hukuman penjara selama dua tahun dan RM20,000 denda, dan jika tidak dibayar dipenjarakan selama enam bulan.

Tarikh Penguatkuasaan

Ketiga-tiga hukuman penjara akan berjalan serentak, dan berkuatkuasa pada hari ini.

Translation Of Sentences

Having considered all the factors submitted by the prosecution, including the mitigating factors submitted by Mr. Jagjit Singh on behalf of the accused, I hereby mete out the following sentences:

1. for the first charge I sentence you to two years imprisonment and RM20,000 fine, in default six months imprisonment;

2. for the second charge I sentence you to two years imprisonment and RM20,000 fine, in default six months imprisonment; and

3. for the third charge I sentence you to two years imprisonment and RM20,000 fine, in default six months imprisonment.

Effective Date

The imprisonment sentences are to run concurrently with effect from today (19 April 1999).

Subsequent Administrative Action A Day After 19 April 1999

As will be noted, as the judgment and sentences were read out on the same date, I was unable to prepare the detailed reasons for the above sentences. Herewith I accordingly supply the reasons which I have managed to piece together, a day after the sentences were handed down. I begin by reproducing s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22/1970, under which provision the accused was charged. It reads:

> Any Member of the administration or any Member of Parliament or the State Legislative Assembly or any public officer, who while being such a Member or officer commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars or to both such imprisonment and fine.

A brief perusal of this section will convince any legal practitioner that the Legislature did not take too kindly to any Member of the administration committing any corrupt practice when carrying out his official duty. The heavy sentence provided for, which included incarceration of up to 14 years, holds testimony to this correct attitude. Inspite of this official view, judges are not precluded from exercising their discretion during the sentencing process, due to the flexibility built into this provision. In the exercise of that discretion, consideration must be given to the views of both the accused and the Public Prosecutor, the objectives of punishment, and even the raging debates regarding current thinkings. By adhering to some of these factors a court will thereby be inhibited from acting arbitrarily or be unduly influenced by the pleas of the antagonists.

It is universally accepted that the objectives of sentencing, *inter alia,* are to exact retribution, deter the recurrence of that offence, the protection of society and finally the rehabilitation of the offender. Undeniably for offences committed under the current charges, as no convicted person generally will succeed when running for a second term, it therefore follows that this factor of deterrence will be irrelevant. On the other hand, eventhough the deterrent effect may be academic on the accused, other potential Members of the administration who harbour thoughts of committing an offence under Ordinance 22/1970 may be dissuaded from so doing, after hearing news of that deterrent sentence. In an indirect manner, society is accorded that necessary protection from avaricious and rapacious politicians thus fulfilling the ultimate justification of any punishment, which is the emphatic denunciation by the community of a crime (*Royal Commission On Capital Punishment,* HMSO 1953, para 53).

With the above principles in mind, it was now encumbent upon me to identify the right sentences, with precedents as the starting block. But they only remained as sources of guidance and no more. Hashim Yeop A. Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 had occasion to say:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
>
> The principles to be applied in imposing sentence however are the same in every case.

For illustration purposes, see below some of the examples of sentences handed down by courts, for offences under s. 2 of Ordinance 22/1970:

1. *Public Prosecutor v. Datuk Tan Cheng Swee & Anor (supra).*

   A fine of RM2,000 was imposed on each charge for the first respondent; the second respondent was fined RM1,000 (first respondent – Commissioner of the Malacca Municipality)

2. *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor (supra).*

   One year imprisonment was imposed as against the first accused (an EXCO member).

3. *Public Prosecutor v. Francis Philip Nunis (supra).*

   Two years imprisonment was imposed (Pengarah Perkhidmatan Bomba).

4. *Public Prosecutor v. Dato Haji Mohamed Muslim bin Haji Othman (supra)*.

   One day imprisonment and fine of RM2,000, in default six months were imposed (an EXCO member).

5. *Wong Voon @ David Wang Chang Vun v. Public Prosecutor (supra)*

   One day imprisonment and fine RM5,000, in default one year imprisonment were imposed (acting Director of Welfare Services).

Perusing the above examples, the disparity in the sentences are quite obvious. Eventhough many jurists have clamoured for consistency, disparity is here to stay due to the allowances and philosophy of the law. This predicament should not be harshly criticised as it merely reflects and confirm the independence of judges when fulfilling their duties. CMV Clarkson in *Criminal Law In Singapore And Malaysia Text And Materials*, at p. 34 authored:

> Another factor is that while the true causes of sentencing disparity are to be found mainly in the different perspectives and attitudes of the sentencing Judges, such disparity is encouraged and becomes entrenched under a system committed to individualized sentencing.

Having pored over the illustrations, and having compared their facts with the current case, I failed to find any redeeming feature on behalf of the accused, except, as a Member of the administration he must have contributed something to the State during his tenure. Apart from that, he had condemned himself and his family with ostracisation from the public at large due to his avarice. At the other extreme end, I found these factors working against him, *inter alia:*

1. there was absolutely no genuine remorse shown or uttered by him even to the ebbing seconds;

2. he was a man of great cunning and dexterity, who had no qualms in garnering assistance from government servants and people in the private sector for his personal gains. In the process he brought odium and misery to them (eg, Md Yusop and Jaini);

3. whatever act he undertook it was done meticulously. He among others, to avoid direct involvement and detection, cleverly set up a company, cleared any impediments whenever Departmental objections were discovered, ensured his presence when the relevant meetings were in progress, and even had the temerity to fabricate evidence when confronted by the Badan Pencegah Rasuah officers; and

4. having received RM500,000, he irreverently deposited it into Luth, an institution meant to propagate one of the tenets of Islam. Why did he not deposit those monies into his account in Bank Islam? No doubt to avoid detection. Who would in the right frame of mind believe that the accused, who had previously performed the Haji, will contemptuously stash away that corrupt money there.

Based on all the above factors, inclusive of the mitigation submitted by the accused, I meted out the above sentences. I allowed the application for stay of execution pending the appeal at the Court of Appeal; I also ordered the fines be paid immediately, regardless of the stay.